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A

CONCISE TREATISE

ON THE LAW RELATING TO

SALES OF LAND.

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BY

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LONDON:

STEVENS AND SONS, 119, CHANCERY LANE,

Law Publishers and Booksellers.

1885.

22034
3/3/92

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE.

PREFACE.

HALF a century of law reform has made Conveyancing a very different art from what it was in the days of Fines and Recoveries. Then, transactions connected with the transfer of land, although less frequent, were of greater magnitude than at the present day, and were completed with what seems to us a lavish expenditure of words and parchment. Now, on the contrary, there is a preponderance of small transfers, and the length of deeds has been diminished to probably one-fourth of their former dimensions. It has been stated on excellent authority* that a thousand deeds connected with land are executed every day in England; and that many of them relate to transactions so small that even a moderate registration fee would be a burthensome tax. As to the vexed question of prolixity, although the ticket system of Conveyancing has not yet come into fashion, it must be admitted that modern drafts have been shorn of all the unnecessary verbiage with which they were formerly overladen.

Simplicity of transfer has been for many years the end to which the energies of law reformers have been directed; and for the attainment of this end two distinct methods have been adopted. The one—Registration of Deeds or Titles—has hitherto been an absolute failure; the other, consisting in successive amendments of the law of real property, has effected a large measure of practical reform.

During the earlier half of the present reign, the work, which had been begun by the abolition of Fines and Recoveries, was continued in almost every Session of Parliament. A single deed of grant replaced more cumbrous forms of assurance; satisfied terms were extinguished; facilities for alienation were provided by the Leases and Sales of Settled Estates Act, and numerous amendments were introduced by the several statutes associated with the names of Lord Cranworth and Lord St. Leonards.

From 1860 until the passing of the Judicature Act little was

* See the evidence of Lord Cairns before the Select Committee of the House of Commons on Land Titles and Transfer, 1879.

done; but ample compensation for this period of inaction was made by the reforms of the ensuing decade.

The Vendor and Purchaser Act provided a cheap and simple mode of determining disputes arising on sales of land, and reduced to forty years the length of title to be shown on an open contract. The Real Property Limitation Act, again, operated in the same direction, by diminishing to twelve years the statutory period for the acquisition of a possessory title.

These, and other preceding changes, however, were dwarfed by the important innovations introduced by the Conveyancing and Settled Land Acts. The professed object of the former was to simplify and improve the practice of Conveyancing; that of the latter to facilitate the alienation of land. Short as the time is during which these statutes have been in operation, it is not too much to say that they have effected something approaching to a revolution in the system of Modern Conveyancing.

To suit these altered conditions the present Work is designed. The effect of the statutes relating to sales of land, and the result of the judicial decisions on the subject, are concisely stated; and the complications which arise in the course of the treaty are considered from the point of view both of the vendor and of the purchaser. Particular attention has been devoted to the arrangement of the several matters; and it will be perceived that the general scheme which has been adopted consists in chronologically following the course of an ordinary transaction of sale.

The works of Lord St. Leonards and of Mr. Dart, which are universally recognized as of the highest authority, have been occasionally cited by us in support of propositions not actually covered by judicial decision. Lord Justice Fry's Treatise on Specific Performance has also been frequently consulted, and has afforded much help in all that relates to the litigious relations of the parties to a sale of land.

A. St. J. C.
H. M. H.

4, New Square, Lincoln's Inn,
May, 1885.

CONTENTS.

CHAPTER I.

THE STATUTE OF FRAUDS.

SECT.		PAGE
1.	Contracts within the Statute	1
2.	Interests in Land	3
	i. Leases and agreements for leases	3
	ii. Lodgings	5
	iii. Tenancy from year to year	5
	iv. Produce of the soil	6
	v. Fixtures	8
	vi. Licences	9
	vii. Land held for partnership purposes	11
	viii. Shares in companies	12
	ix. Rent	13
3.	Collateral Agreements	13
4.	Signature of the Agreement	15
	i. What is a sufficient signature	15
	ii. Signature by a witness	17
	iii. Signature by an agent	18
	iv. Position of signature	19
	v. Form of signature	19
5.	What is a sufficient Memorandum or Note	20
6.	Exceptions from the Statute	23
	i. Action on executed agreement	23
	ii. Fraud	24
	iii. Part performance	25
	iv. Equitable mortgage by deposit	29
	v. Vendor's and purchaser's liens	29
7.	Defence of the Statute, how raised	29

CHAPTER II.

THE AGREEMENT.

SECT.		PAGE
1.	Sales, Leases and Mortgages	31
2.	Form of the Agreement	32
3.	The Names of the Parties	33
	i. What is a sufficient description	34
	ii. What is an insufficient description	35
4.	The Description of the Property	37
	i. Imperfect on the face of the agreement	37
	ii. Defective through extrinsic circumstances	38
5.	The Price	38
	i. Valuation and arbitration	38
	ii. Fixtures, &c. at a valuation	42
	iii. Duties of valuers and arbitrators	44
	iv. Award, when set aside	45
6.	Contracts for Leases	46
7.	Rights of Pre-emption	47
	i. In wills	47
	ii. In leases	48
	iii. In partnership articles	52
	iv. On sales	52
	v. Under the Lands Clauses Act	53
8.	Offer and Acceptance	54
9.	Contract by Letters	57
10.	Reference to a Formal Agreement	60
11.	Incorporation of Documents	62
	i. What documents may be incorporated	62
	ii. What is a sufficient reference	63

CHAPTER III.

PARTICULARS AND CONDITIONS OF SALE.

1.	Preparation of Particulars and Conditions	66
2.	Description of the Property	67
3.	Plan of the Property	72
4.	The Biddings	73
5.	Fixtures and Timber	74
6.	Delivery of Abstract	75
7.	Time for Requisitions	76
8.	Rescission of Contract	77
9.	Commencement of Title	79

CHAP. III.—PARTICULARS AND CONDITIONS OF SALE—*continued.*

SECT. PAGE
10. Special Conditions as to Title 81
11. Recitals to be Evidence 83
12. Receipt for Rent to be Evidence 84
13. Identity of Property 86
14. Rights of Way and Easements 87
15. Land for Building 88
16. Apportionment of Rents 90
17. Indemnity by Purchaser of Lease 91
18. Expenses of proving Title 92
19. Deeds 92
20. Compensation 93
21. Completion of Purchase 95
22. Resale. Forfeiture of Deposit 97

CHAPTER IV.

SALES BY AUCTION.

1. The Conduct of the Auction 99
2. The Auctioneer 101
i. His authority 101
ii. His position as agent 101
iii. His liability 103
(a) To the vendor 103
(b) To the purchaser 103
iv. His remuneration 104
3. The Auction 106
i. The Sale of Land by Auction Act, 1867 106
ii. Sale without reserve 107
iii. Sale with reserve 107
iv. Biddings 108
4. The Deposit 109
i. The auctioneer a stakeholder 109
ii. Payment by cheque 111
by bill of exchange 111
by cash 111
iii. Interpleader 112
iv. Forfeiture 115
v. Lien 117

CHAPTER V.

SALES AND PURCHASES BY TRUSTEES.

SECT.		PAGE
1.	Trustees for Sale	121
	i. Bare power and power annexed to estate	121
	ii. Survivorship and assignment of powers	122
	iii. Consents	125
	iv. Manner of sale	127
	v. Time for sale	130
	vi. When beneficiaries are absolutely entitled	132
2.	Purchase of Trust Property by the Trustee	134
	i. From himself	134
	ii. From his cestui que trust	134
	iii. Purchase by executor	136
	iv. Purchase by agent for sale	137
	v. Purchase by solicitor from client	137
	vi. Remedies of cestui que trust	139
	vii. Acquiescence and confirmation	140
3.	Sale by Tenant for Life under Settled Land Act, 1882	141
4.	Sale by Executors for Payment of Debts	145
5.	Sale by Mortgagee	147
	i. To what extent mortgagee is a trustee	147
	ii. His power of sale	148
	iii. May not sell to himself	152
	iv. May purchase from mortgagor	153
6.	Sale by Trustee in Bankruptcy	154
7.	Sale by Trustees of a Charity	155
8.	Purchases by Trustees	156

CHAPTER VI.

SALES BY THE COURT.

1.	Jurisdiction of the Court	159
	i. Partition Act	159
	ii. Conveyancing Act, 1881, s. 25	162
	iii. Settled Estates Act, 1877	163
	iv. Subsidiary regulations	163
2.	Conduct of the Sale	163
	i. How given	163
	ii. To whom given	164
	iii. Leave to bid	164
	iv. Certificate of result	165
	v. Opening biddings	165

CHAP. VI.—SALES BY THE COURT—*continued.*

SECT. PAGE
3. Payment of Purchase-Money 166
i. Order for payment into Court 166
ii. Payment out of Court 166
4. Completion of Purchase 167
i. Necessary parties 167
ii. Discharge of incumbrances 167
iii. Trustee Act 168
iv. Conveyance, how settled 168
v. Title deeds 168
5. Discharge of Purchaser 168

CHAPTER VII.

SALES UNDER LANDS CLAUSES CONSOLIDATION ACT, 1845.

1. What Lands and Interests may be taken 170
i. Lands 171
ii. Easements 171
iii. Minerals 172
iv. Part of house 173
v. Copyholds 174
vi. Common lands 174
vii. Other interests 175
2. Purchase by Agreement 176
i. With absolute owner 176
ii. With trustees 176
iii. Ascertainment of purchase-money 177
iv. Time for completion 179
3. Compulsory taking 180
i. The notice 180
ii. Ascertainment of price 182
iii. Payment of purchase-money 183
4. The Conveyance 183
5. Entry on Lands before Purchase 185
6. Compensation where Lands injuriously affected 186
7. Sale of superfluous Land 187

CHAPTER VIII.

THE ABSTRACT.

SECT.		PAGE
1.	The Preparation	190
2.	The Contents	191
3.	The Title	193
	i. Forty years' title	193
	ii. Root of title	193
4.	Proof of Title	195
	i. Production of documents	195
	ii. Identity of property	199
	iii. Incidental facts	199

CHAPTER IX.

TITLE UNDER THE STATUTES OF LIMITATION.

1.	Extinguishment of Right	201
2.	Arrears of Rent and Interest	205
3.	Express Trust and Fraud	206

CHAPTER X.

TITLE UNDER THE PRESCRIPTION ACT.

1.	Rights of Common and Profits à prendre	207
	i. Adverse possession	208
	ii. Custom	209
2.	Rights of Way and other Easements	210
	i. Highways and private ways	210
	ii. Watercourses	211
	iii. Right to support	214
3.	Right to Light	215
	i. Ancient lights	215
	ii. Interruption	216
	iii. Enjoyment by agreement	216
	iv. Amount of light	216

CHAPTER XI.

FRAUDULENT AND VOLUNTARY CONVEYANCES.

SECT. PAGE
1. Fraudulent Conveyances under 13 Eliz. c. 5 218
i. Intention to defraud 218
ii. Conveyances by bankrupts 220
2. Voluntary Conveyances under 27 Eliz. c. 4 221

CHAPTER XII.

COVENANTS RELATING TO THE LAND.

1. Covenants in Leases 225
2. Covenants between Vendor and Purchaser 226
i. Benefit of covenants 226
ii. Burden of covenants 228
3. Restrictive Covenants of which Purchaser has Notice . . . 229
i. Notice 229
ii. Mutual covenants on sale of building land . . . 231
iii. Acquiescence in breaches 232

CHAPTER XIII.

DOWER AND CURTESY.

1. Dower 235
2. Curtesy 237

CHAPTER XIV.

SUCCESSION DUTY. . . . 238

CHAPTER XV.

REQUISITIONS.

1. What Requisitions should be made 242
2. Waiver of Requisitions 247
i. By laches and acquiescence 247
ii. By taking possession 249

CHAPTER XVI.

SEARCHES.

SECT. PAGE
1. In the Central Office 252
2. In the County Register 254

CHAPTER XVII.

INTEREST AND POSSESSION.

1. Position of Parties after Contract 256
i. Vendor a trustee for purchaser 256
ii. Purchaser a trustee for vendor 257
2. Interest on Purchase-money 257
i. When it commences 257
ii. Rate 258
iii. Appropriation of purchase-money 258
3. Purchaser's Right to Possession 259
i. Correlative with vendor's right to interest . . . 259
ii. Possession taken by purchaser before completion . . 259
iii. Possession retained by vendor after time for completion . 260
4. Purchaser's Lien for Deposit 261

CHAPTER XVIII.

VENDOR'S LIEN.

1. How the Lien arises 263
i. When it arises 263
ii. Over what property 263
iii. In respect of what purchase-money 264
iv. Against what persons 266
2. How lost 267
3. How enforced 268
4. Locke King's Acts 269
5. Lien on Land taken by a Railway Company 270

CHAPTER XIX.

CHANGES BETWEEN CONTRACT AND CONVEYANCE.

1. In the Property 271
i. Not by the act or default of the vendor 271
ii. By the act or default of the vendor 272
2. In the Parties 273
i. Death 273
ii. Bankruptcy 274
iii. Lunacy 274
iv. Assignment 275

CHAPTER XX.

TIME FOR COMPLETION.

SECT.		PAGE
1.	The Rule in Equity	276
	i. Time not of the essence of the contract	276
	ii. Exceptions	277
2.	Time made of the Essence by the Contract	278
3.	Time made of the Essence by subsequent Notice	279
4.	Time for Completion Waived	280

CHAPTER XXI.

THE CONVEYANCE.

1.	Preparation of the Conveyance	281
2.	The Parties	282
	i. Legal estate	282
	ii. Trust estate	283
	iii. Mortgages	283
3.	Recitals	287
4.	Operative Words	288
5.	The Receipt	289
	i. What receipt sufficient	289
	ii. Payment to solicitor	290
6.	The Parcels	291
	i. Description of the property	291
	ii. Minerals	291
	iii. Soil of highway, &c.	292
	iv. Rights of way	293
	v. Continuous and apparent easements	294
	vi. General words	295
7.	Covenants for Title	295
8.	Execution	298
9.	Acknowledgment by Married Woman	300
10.	Inrolment	301
11.	Production of Deeds	302
	i. Acknowledgment and undertaking	302
	ii. Custody	303
	iii. Attested copies	303

CHAPTER XXII.

STAMPS.

SECT. PAGE
1. The Duties 305
2. What Instruments must be Stamped 307
3. Stamping after Execution 309

CHAPTER XXIII.

NOTICE.

1. The Doctrine of Notice 311
i. Grounds of doctrine 311
ii. Purchaser without notice may sell to person with notice . 312
iii. Conveyancing Act, 1882, s. 3 312
2. Actual Notice 313
3. Constructive Notice 314
i. Definition of 314
ii. From contents of documents 314
iii. From absence of title deeds 317
4. Notice through an Agent 321
i. Actual to agent is actual to principal 321
ii. Where same solicitor employed by both parties . . 323
iii. Presumption rebutted by fraud of solicitor . . . 324
5. Notice in Register County 325
i. In Middlesex 325
ii. In Yorkshire 326
iii. Registration of memorandum of deposit 328
iv. Equitable mortgage without memorandum . . . 329
v. Registration of wills 330

CHAPTER XXIV.

PURCHASE FOR VALUE WITHOUT NOTICE.

1. The Defence: to what it extends 332
i. Against the legal estate 332
ii. As between equities 334
2. Protection afforded by Legal Estate 335
i. Where equities are equal the law shall prevail . . . 335
ii. Legal estate acquired by fraud 335
iii. Acquired from a trustee 336
iv. Legal mortgagee without the deeds 337

CHAP. XXIV.—Purchase for Value without Notice—*continued.*

SECT. PAGE
3. Tacking of Mortgages 338
i. Third mortgagee buying in first 338
ii. Further advances 339
iii. Debts tacked to mortgage 340
iv. Statutes prohibiting tacking 341
4. Consolidation of Mortgages 342
i. What mortgages may be consolidated . . . 342
ii. As against whom 342
iii. Conveyancing Act, 1881, s. 17 343
5. Priority among equitable Interests 344
i. Qui prior est tempore 344
ii. Equitable mortgagee without all the deeds . . 344
iii. Best right to call for legal estate 345
iv. Receipt endorsed by building society . . . 346

CHAPTER XXV.

MISDESCRIPTION AND COMPENSATION.

1. What is a Misdescription 348
2. Effect of Misdescription 351
i. Whether it avoids the contract. 351
ii. Compensation 351
iii. Indemnity 353
iv. Recovery of deposit 354
v. Damages for breach of contract 354
3. Assessment of Compensation 356
4. Vendor's Action. Specific Performance without Compensation . 359
i. No misdescription 359
ii. Misdescription corrected by notice 361
iii. Waiver 363
5. Vendor's Action. Specific Performance with Compensation . . 364
i. In what cases enforced 364
ii. Effect of condition 366
6. Vendor's Action. Specific Performance refused 367
i. Defects in quantity 367
ii. Defects in the nature of the property . . . 369
iii. Defects in the estate or interest of the vendor. . . 372
7. Purchaser's Action. Specific Performance with Compensation . 375
8. Purchaser's Action. Compensation refused 377
i. Express contract 377
ii. Amount of compensation not ascertainable . . 378
iii. Extreme hardship 379
iv. Knowledge or notice 380
v. Rights of third persons affected 381

CHAPTER XXVI.

MISREPRESENTATION AND FRAUD.

SECT.		PAGE
1.	Misrepresentation as distinguished from Misdescription	382
2.	By whom Misrepresentation may be made	384
	i. Vendor	384
	ii. Purchaser	385
	iii. Agent	385
	iv. Third person	389
3.	How and when Misrepresentation may be made	393
4.	What the Misrepresentation may consist of	396
	i. Existing facts	396
	ii. Indefinite statements	398
	iii. Simple commendation	399
	iv. Disparaging statements	399
	v. Statements of value	399
5.	The Falsehood of the Statement	401
6.	Legal and Moral Fraud	402
7.	Reliance on the Statement by the Person to whom it is made	405
8.	Suppressio veri	408
9.	The Remedies of the Person deceived	413
10.	Laches and Delay	414

CHAPTER XXVII.

MISTAKE.

1.	Contracts entered into by Mistake	416
	i. Common mistake	417
	ii. Mistake of one party	418
2.	Mistake in the Written Agreement	421
	i. Parol evidence on behalf of the plaintiff	421
	ii. Parol evidence on behalf of the defendant	423
	iii. Subsequent parol variations	426
3.	Procedure in Cases of Mistake	429
4.	Rectification	430
	i. Of agreements	430
	ii. Of conveyances	431
	iii. Requisite evidence	433
	iv. Reconveyance	434
	v. Settlements	436
5.	Mistakes of Fact and Mistakes of Law	437

CHAPTER XXVIII.

SPECIFIC PERFORMANCE.

SECT.		PAGE
1.	Jurisdiction	440
2.	The Plaintiff's Case	444
	i. Parties	444
	ii. Pleading	450
3.	The Defendant's Case	452
	i. Statement of defence	452
	ii. Defences on legal grounds	454
	(a) No contract	454
	(b) Personal incapacity	454
	(c) Illegality	456
	(d) Statute of Frauds	456
	(e) Contract rescinded	456
	(f) Plaintiff's breach of contract	456
	iii. Defences on equitable grounds	457
	(a) Unfairness	457
	(b) Hardship	458
	(c) Contract not capable of being executed	460
	(d) Plaintiff's laches	461
4.	Counter-claim and Reply	464
5.	Proceedings in the Action before Trial	466
	i. Account	466
	ii. Decision of point of law	466
	iii. Judgment on admissions	466
	iv. Payment into court	467
	v. Injunctions	470
6.	Judgment and consequent Directions	471
	i. Form of the judgment	471
	ii. Reference of title	472
	iii. Doubtful titles	473
	(a) General law	473
	(b) Particular instruments	476
	(c) Facts	476
	iv. Time when a good title shown	477
7.	Damages	478
8.	Costs	481
9.	Summons under the Vendor and Purchaser Act	485

CHAPTER XXIX.

COMMON LAW REMEDIES OF VENDOR AND PURCHASER.

SECT.		PAGE
1.	Actions by the Vendor	492
	i. For the purchase-money	492
	ii. For damages in respect of a breach of contract	494
	iii. For use and occupation	495
	iv. For the recovery of the title deeds	495
2.	Actions by the Purchaser	496
	i. For the deposit	496
	ii. For damages in respect of a breach of contract	496
	iii. For money had and received	499
3.	Action of Deceit	500
4.	Action upon the Covenants for Title	506
	i. When the only remedy	506
	ii. Who entitled to sue	507
	iii. What constitutes a breach	508
	iv. Measure of damages	513

CHAPTER XXX.

RESCISSION OF THE CONTRACT.

1.	While it continues Executory	515
	i. Rescission under a clause in the agreement	516
	ii. Rescission by subsequent agreement	517
	iii. Rescission by one party	518
	(a) For fraud	519
	(b) For mistake	520
	(c) For default of the other party	521
	iv. How the right to rescind may be lost	524
2.	After it has been carried into Execution	527
	i. For fraud or mistake	527
	ii. Action of deceit compared with rescission	529
	iii. Contract induced by fraud voidable not void	530
	iv. Restitutio in integrum	531
	v. Right to rescind barred by delay	535

TABLE OF CASES.

A.

PAGE

Abbott *v.* Geraghty 315
——— *v.* Sworder 481, 482, 484
Aberaman Iron Works *v.* Wickens. 117, 262, 368, 519, 534
Ackroyd *v.* Smith 294
Acland *v.* Gaisford 257, 259
Acton *v.* Blundell 213
Adams *v.* Broke 125
——— *v.* Claxton 341
——— *v.* Clutterbuck 10
——— and Kensington Vestry, *Re* 49, 52, 273, 274, 488
——— *v.* Lindsell 56
——— *v.* London and Blackwall Rail. Co. 181, 182
——— *v.* Scott 151
——— *v.* Taunton 123
Addies' Charity, Feoffees of, *Ex parte* 183
Agar *v.* Macklew 39
Agg-Gardner, *Re* 487
Agra Bank *v.* Barry 322, 326, 327, 328, 337
Albert Life Assurance Co., *Re* .. 265
Alcock, *Re* 149
——— *v.* Delay 64
Alderson *v.* White 53
Alderton *v.* Archer 2
Alexander *v.* Crosbie 433
——————— *v.* Crosby 197, 249
——————— *v.* Crystal Palace Rail. Co. 174
——————— *v.* Mills 126, 474, 476
Alison, *Re* 147, 150, 151, 202, 203
Allen *v.* Bennet 15, 64
——— *v.* Harding 441
——— *v.* Knight 318, 336, 344
——— *v.* Richardson 355, 528
——— *v.* Seckham 320
——— *v.* Taylor 294, 295
Alley *v.* Deschamps 462
Alloway *v.* Braine 462
Allwood *v.* Heywood 303
Alvanley *v.* Kinnaird 419, 526
Ambrose *v.* Ambrose 114
Anderson *v.* Higgins 194
——————— *v* Oppenheimer 511
——————— *v.* Pignet 286
——————— *v.* Wallace 44
Andrew *v.* Aitken 228
——— *v.* Andrew 263, 266
Andrews' Trusts, *Re* 220
Andrews *v.* Paradise 510
Angell *v.* Duke 14, 425
Anglo-Italian Bank *v.* Davies .. 340
Angus *v.* Dalton 214
Annesley *v.* Ashurst 132
——————— *v.* Muggridge 113, 114
Anon (5 Vin. Abr. 522) 423
——— (2 Freem. 106) 355
——— (2 Ves. sen. 662) 340
——— (6 Mad. 10) 147
——— *v.* Walford 448
Anson (Lord) *v.* Hodges .. 98, 116, 117
——— *v.* Towgood 166
Anspach (Margravine of) *v.* Noel .. 247, 250
Anstee *v.* Nelms 202
Appleby *v.* Johnson 54
Appleton *v.* Rowley 237
Archer *v.* Baynes 62
——— *v.* Slater 199
Arkwright *v.* Gell 213, 214
——————— *v.* Newbold .. 401, 402, 409, 500, 501
Arnold, *Re* 73, 94, 117, 169, 365, 367, 372, 420
Arnot *v.* Biscoe 389
Arnsby *v.* Woodward 516
Ashley, *Ex parte* 153
Ashton *v.* Stock 206
——— *v.* Wood 124
Ashworth *v.* Mounsey 83, 152
Astley *v.* Manchester Rail. Co. .. 189
Atkinson *v.* Smith 222
Atterbury *v.* Wallis 325
Att.-Gen. *v.* Backhouse 316
——————— *v.* Baliol Coll. Oxford .. 534
——————— *v.* Biphosphated Guano Co. 71, 73
——————— *v.* Brettingham 156
——————— *v.* Brooke 155
——————— *v.* Brown 308
——————— *v.* Christchurch 258
——————— *v.* Corporation of Newcastle 224
——————— *v.* Day 3, 30, 273, 372
——————— *v.* Dowling 238
——————— *v.* Dudley (Lord) 136
——————— *v.* Flint 315
——————— *v.* Floyer 238
——————— *v.* Foord 155
——————— *v.* Gaskill 29

PAGE

Att.-Gen. *v.* Great Eastern Rail. Co. 212
——— *v.* Green 155
——— *v.* Hall 315
——— *v.* Hungerford 156
——— *v.* Kerr 155
——— *v.* Magdalen College..156, 435
——— *v.* Mathias 209
——— *v.* Mayor of Newark .. 155
——— *v.* Mitchell 238
——— *v.* Pargeter 155, 316
——— *v.* Pilgrim 156, 316
——— *v.* Sitwell 430
——— *v.* South Sea Co. 155
——— *v.* Tomline 71
——— *v.* Upton 238
Attree *v.* Hawe 13
Attwood *v.* Small..400, 406, 515, 519, 526, 530, 532
Austin *v.* Amhurst 175, 209
——— *v.* Chambers 138
——— *v.* Tawney 48, 278, 476
Avarne *v.* Brown 193
Ayles *v.* Cox (16 Beav. 23) 67, 93, 371
——— ——— (17 Beav. 584) ...168, 285
Aylesford's (Earl of) Case 25
Aylett *v.* Ashton 353
Aynsley *v.* Glover 207, 216, 479

B.

Backhouse *v.* Charlton 162
Bacon *v.* Simpson 272
Badcock, *Ex parte* 139
Baden *v.* Countess of Pembroke.. 273
Baglehole *v.* Walters 370
Bagot *v.* Easton 451
Bailey, *Re* 146
——— *v.* Appleyard 209
——— *v.* Sweeting 2, 21, 62
Baillie *v.* McKewan 336
Bain *v.* Fothergill 496, 497
Bainbridge *v.* Kinnaird.....353, 380
Baker *v.* Bent 358
——— *v.* Carter 139
——— *v.* Gray 343
——— *v.* Loader 448
——— *v.* Metropolitan Rail. Co. 178, 179
——— *v.* Monk 458
——— *v.* Peck 134
——— *v.* Read 140
——— *v.* White 475
Baldwin *v.* Belcher 257, 275
Ball *v.* Dunsterville 298
—— *v.* Kemp-Welch 162
Ballard *v.* Shutt 258
——— *v.* Tomlinson 213
——— *v.* Way 314, 374
Balmanno *v.* Lumley.....353, 467
Bamford *v.* Shuttleworth 110
——— *v.* Watts 166
Bandon (Lord) *v.* Becher..... 169
Banister, *Re*.....66, 80, 82, 169

PAGE

Bankart *v.* Bowers 494
——— *v.* Tennant 392
Banner *v.* Berridge 147, 206
Bannerman *v.* Clarke 96
Barber, *Ex parte* 284
Barclay, *Ex parte* 74
——— *v.* Raine 226, 302
Barker *v.* Cox 128, 357
——— *v.* Greenwood 111
——— *v.* North Staffordshire Rail. Co. 181
——— *v.* Smark 268
Barkshire *v.* Grubb 293
Barlow *v.* Rhodes 295
Barnard *v.* Cave 423
Barnes *v.* Addy 448
——— *v.* Loach 217
——— *v.* Southsea Rail. Co. 174
——— *v.* Wood 357, 376
Barnett *v.* Weston.....318, 337, 340
——— *v.* Wheeler 193, 249
Barnhart *v.* Greenshields..... 313
Barnwell *v.* Harris 68
Barratt *v.* Wyatt 287
Barraud *v.* Archer ..69, 314, 350, 362
Barrell, *Ex parte* .. 97, 114, 115, 261, 274, 449
——— *v.* Sabine 53
Barrett *v.* Ring 375
Barrow *v.* Barrow 436
Barry *v.* Croskey 395
Bartlett, *Re* 165
——— *v.* Purnell 102, 103
——— *v.* Salmon 68, 386
Bartley *v.* Bartley..... 125
Barton *v.* Dawes 291
——— *v.* Latour 167
——— *v.* Vanheythuysen 221, 224
Barwell *v.* Barwell 140
Barwick *v.* English Joint Stock Bank 386, 388
Baskcomb *v.* Beckwith.....73, 227
Basset *v.* Nosworthy 332, 333, 334
Bastin *v.* Bidwell 51
Bates *v.* Johnson 340
Battersby *v.* Rochfort 330
Battersea Park Acts, *Re* 181
Baugh *v.* Price 139
Baumann *v.* James.....62, 64
Baxendale *v.* Seale.....417, 422, 460
Baxter *v.* Lewis..... 496
Bayley *v.* Great Western Rail. Co.....172, 293
Baylis *v.* Tyssen-Amhurst 209
Baynham *v.* Guy's Hospital....50, 51
Bayspoole *v.* Collins 222
Beattie *v.* Lord Ebury 396, 397
Beauchamp (Lord) *v.* Great Western Rail. Co..... 188
——— (Earl) *v.* Winn..438, 520, 533
Beauclerk *v.* Ashburnham 157
Beaumont *v.* Bramley 432
——— *v.* Dukes 88, 398
Bebb *v.* Bunny 258

PAGE
Beck, *Re* 105
Beckett *v.* Corporation of Leeds.. 292
——— *v.* Midland Rail. Co. 186
——— *v.* Sutton 168
Beddow *v.* Beddow 45
Bedford *v.* Bacchus 326
——— (Duke of) *v.* Dawson .. 186
——— (Duke of) *v.* Trustees of the British Museum 232
Beer *v.* London and Paris Hotel Co. 36
Beeston *v.* Stutely..... 380
——— *v.* Weate 210, 214
Beevor *v.* Luck 343
Behn *v.* Burness 383
Beioley *v.* Carter.....475, 476
Belchier *v.* Butler 340
Bell *v.* Holtby.....474, 475, 476
—— *v.* Howard 427
—— *v.* Love 214
—— *v.* Wilson 292
Bellairs *v.* Tucker 396, 504
Bellamy and Metropolitan Board of Works, *Re* ..290, 488, 489
——— *v.* Sabine 138
Bellis's Trusts, *Re*..... 284
Belworth *v.* Hassell 351, 366
Benecke *v.* Chadwicke 54
Bennett, *Ex parte* 135, 139
——— *v.* Fowler 484
——— *v.* Womack 70
Benson *v.* Lamb 279, 286
Bentinck *v.* Norfolk Estuary Co. 171
Bentley *v.* Craven 69
——— *v.* Mackay 423, 434, 521
Beresford *v.* Bathyany 54
Berkeley *v.* Dauh 192
Berridge *v.* Ward 292
Berrisford *v.* Milward 393
Berry *v.* Armistead 520
—— *v.* Gibbons 164, 523
—— *v.* Johnson..... 169
—— *v.* White 143
—— *v.* Young.....110, 276
Besley *v.* Besley 355, 512
Best *v.* Hamand 81
Betts *v.* Great Eastern Rail. Co... 188
Bevan *v.* Habgood 141
Beverley (Mayor of) *v.* Craven .. 196
Bewley *v.* Atkinson 216
Bexwell *v.* Christie 106
Bickett *v.* Morris 292
Biddle *v.* Perkins 130
Biel's Estate, *Re* 136
Biggs *v.* Bree..... 109
——— *v.* Peacock 161
Bingham *v.* Bingham....417, 527, 528
Binks *v.* Lord Rokeby....69, 257, 272
Birch *v.* Ellames.....317, 318
——— *v.* Joy 258
Bird *v.* Boulter 103
—— *v.* Fox 83, 199
Birkbeck Land Society, *Ex parte*.. 309
Birmingham Canal Co. *v.* Cartwright.....52, 449

PAGE
Birmingham Corporation *v.* Baker 96
Bisco *v.* Earl of Banbury 314
Blachford *v.* Kirkpatrick..... 248
Blackburn *v.* Gregson 29
——— *v.* Smith 75, 191, 531
——— *v.* Stace 467, 470
Blacklow *v.* Laws 75, 131, 248
Blackwood *v.* London Chartered Bank 336
Blagden *v.* Bradbear 3
Blair *v.* Ormond 198
Blake *v.* Phinn 68, 374
Blanchard *v.* Bridges..... 72, 294
Bleakley *v.* Smith..... 19
Blennerhassett *v.* Day 138
Blewitt, In the goods of 19
——— *v.* Tregonning 209
Bligh *v.* Brent 12
Bliss *v.* Collins 91
Bloomer *v.* Bernstein 522
——— *v.* Spittle 433, 529
Blore *v.* Sutton.....18, 28, 46, 144
Bloye's Trusts, *Re* 137
Blundell *v.* Brettargh.....38, 40
Blyth *v.* Elmhirst 472
——— and Young, *Re* 490
Board *v.* Board 202
Boardman *v.* Mostyn 28
Boehm *v.* Wood.....192, 278, 280, 467
Bold *v.* Hutchinson 436
Boldero *v.* London and Westminster Discount Co. 219
Bolingbroke's (Lord) Case 375
Bolland, *Ex parte* 220
Bolling *v.* Hobday 202
Bolton *v.* Bishop of Carlisle..... 435
——— *v.* Bolton 72, 293
——— *v.* School Board for London 84, 259, 287
Bond *v.* Hopkins.....24, 25
—— *v.* Kent 268
—— *v.* Rosling 5
Bonner *v.* Great Western Rail. Co. 216
——— *v.* Johnston.....467, 468
Bonnewall *v.* Jenkins 55, 59
Boone *v.* Eyre 492
Booth *v.* Alcock 72, 294, 512
——— *v.* Pollard 443
——— *v.* Smith..... 90
——— *v.* Turle..... 25
Boothby *v.* Walker 470
Borell *v.* Dann 150, 316
Bos *v.* Helsham 40, 355
Boschetti *v.* Power 469
Boswell *v.* Coaks ..136, 139, 140, 165, 385, 410, 534
Botting *v.* Martin 5
Boughton *v.* Jewell 304
Boulter, *Re*..... 430
Bourdillon *v.* Collins..... 35
Bourne *v.* Bourne 150
Boursot *v.* Savage 325, 531
Bousfield *v.* Hodges....100, 127, 132, 164, 247

PAGE

Bowen *v.* Evans (2 H. L. C. 257). 169
——— (1 J. & Lat. 178) 335,346
Bower *v.* Cooper 67
Bowers *v.* Cator..... 25
Bowes *v.* Law 229
Bowker *v.* Burdekin 298
Bowles *v.* Round 71
——— *v.* Stewart 448
Bowman *v.* Hyland 77, 378
Bown *v.* Stenson 250
Bowser *v.* Maclean 71
Boyce *v.* Greene..... 12
Boyd *v.* Allen..... 161
—— *v.* Belton 393
—— *v.* Petrie..... 152
Boydell *v.* Drummond 64
Boyes *v.* Liddell 467
Boys *v.* Ayerst 55
Brace *v.* Duchess of Marlborough 339
——— *v.* Wehnert 442
Bradford *v.* Belfield 124
——— (Earl of) *v.* Earl of Romney 433, 436
Bradley *v.* Holdsworth..... 12
——— *v.* Munton 285
——— *v.* Riches.....324, 327
Bradshaw *v.* Bradshaw 469, 470
——— *v.* Fane 130
Bramley *v.* Teal..... 469
Bramwell *v.* Lacy 233
Brand *v.* Hammersmith Rail. Co. 233
Brandling *v.* Plummer..... 71
Brandlyn *v.* Ord 312
Brassey *v.* Chalmers..... 130
Bratt *v.* Ellis 101
Bray *v.* Briggs 418
Braybroke (Lord) *v.* Inskip ..192, 477
Brecon (Mayor of) *v.* Seymour .. 341
Bree *v.* Holbech 439, 506
Brennan *v.* Bolton..... 26
Brentwood Brick Co., *Re* 263, 266
Brett *v.* Clowser .. 67, 108, 293, 354, 386, 393
Brewer, *Re* 171
——— *v.* Broadwood .. 116, 117, 357, 373, 522
——— *v.* Brown..94, 350, 519, 522, 530
Bridge *v.* Beadon 345
Bridges *v.* Garrett..... 111
——— *v.* Longman 85
——— and McRae's Contract, *Re*..... 477
Briggs *v.* Jones 337
Bright *v.* Walker 209, 213
Brighton (Mayor of) *v.* Guardians of Brighton 156, 203
Bringloe *v.* Goodson 198
Brisbane *v.* Dacres 439
Bristol (Corporation of) *v.* Westcott 234
——— (Earl of) *v.* Hungerford .. 340
Bristow *v.* Booth 286
Britain *v.* Rossiter 25, 27
British and American Telegraph Co. *v.* Colson 57

PAGE

British Museum (Trustees of) *v.* Finnis 210
Brogden *v.* Metropolitan Rail. Co. 22, 56, 57, 60
Brooke *v.* Garrod 48, 278
——— *v.* Haymes..... 288
——— (Lord) *v.* Rounthwaite 95, 349, 359, 399, 405
Brookes *v.* Drysdale 70
Brooksbank *v.* Smith..... 439
Broome *v.* Monck 522
Brotherton *v.* Hatt 322
Brown and Sibly, *Re* 489
——— *v.* Carter..... 223
——— *v.* Paull 90
——— *v.* Tighe..... 50
Browne *v.* Warner 461
Browning *v.* Stevens 407
Browlie *v.* Campbell 94, 397, 401, 404, 405, 528
Brown's Settlement, *Re* 131, 132
——— Will, *Re*..... 144
Brumfit *v.* Morton 363, 373
Bryant *v.* Busk 92, 196
Buccleuch (Duke of) *v.* Metropolitan Board of Works 44, 187
Buck *v.* Lodge 468, 469, 470
Buckhouse *v.* Crossby 427
Buckland *v.* Papillon 52, 70, 448
——— *v.* Pocknell..... 265
Buckle *v.* Mitchell 221, 446
Buckley *v.* Howell 129
Buckmaster *v.* Harrop 3, 449
Bull *v.* Hutchens 85, 474
Bulteel *v.* Lord Abinger 127
Bunting *v.* Sargent 158, 205
Burgess's Case 535
Burgess *v.* Wheate.....261, 262
Burgoyne *v.* Hatton..... 315
Burnell *v.* Brown ..72, 250, 358, 363, 374, 415
Burnes *v.* Pennell 396, 528
Burnett *v.* Lynch 91
Burrough *v.* Skinner 109, 110
Burroughes *v.* Browne..... 114
Burroughs, Lynn and Sexton, *Re*..486, 488, 489
——— *v.* McCreight 202
——— *v.* Oakley ..251, 468, 469, 470
Burrow *v.* Scammell..... 357
Burrowes *v.* Lock 390, 405
Burstall *v.* Beyfus 448
Burton *v.* Knight 45
Bush *v.* Trowbridge Waterworks Co.....172, 186
Bushell *v.* Bushell..... 326
Bustard's Case 194
Butcher *v.* Stapely 25, 313
——— *v.* Stead..... 220
Buttemere *v.* Hayes 6
Butterfield *v.* Heath..... 221
Buxton, *Ex parte* 92
——— *v.* Lister 400, 441
Byrne *v.* Tienhoven 55

C.

PAGE

Caballero *v.* Henty..68, 363, 371, 380
Caddick *v.* Skidmore 11
Cadman *v.* Horner 385
Cadogan *v.* Earl of Essex 157
Cahill *v.* Cahill 300
Calcraft *v.* Roebuck 97, 258, 364, 365, 370
Calder *v.* Dobell 36
Caledonian Rail. Co. *v.* Carmichael 116
——— *v.* Sprot 214
——— *v.* Walker's Trustees 186
Calisher *v.* Forbes..... 345
Callaghan *v.* Callaghan 426
Calthorp *v.* Heyton 511
Calverley *v.* Williams 420
Calvert *v.* Godfrey 169
Camberwell Building Society *v.* Holloway....68, 192, 283, 361, 373
Camden (Marquis) *v.* Murray (16 Ch. D. 161).. 131
——— (27 S. J. 652).. 144
Campbell *v.* Fleming 526
——— *v.* Walker....129, 134, 139, 140, 164
——— *v.* Wilson 210
Cane *v.* Lord Allen 137, 139
Cann *v.* Cann..... 355
Cannon *v.* Johnson 162
Cant, *Re* 48
Cape Breton Co., *Re*..... 410
Capell *v.* Great Western Rail. Co. 494
Capper *v.* Spottiswoode 268
Carew, *Re* 108
Cargill *v.* Bower 451
Carington *v.* Wycombe Rail. Co.. 189
Carlisle Banking Co. *v.* Thompson 346
Carolan *v.* Brabazon..... 427
Carpenter *v.* Blandford 280
——— *v.* Buller 288
Carpmael *v.* Powis 434
Carrington *v.* Roots 8
Carrodus *v.* Sharp 96, 257
Carroll *v.* Keayes 350, 363
Carta Para Gold Mining Co. *v.* Fastnedge 143
Carter, *Ex parte* 342
——— *v.* Carter 335
——— *v.* Dean of Ely 277, 518
——— *v.* Palmer 138
——— *v.* Williams 230, 231, 319
Casamajor *v.* Strode (2 Myl. & K. 706)..... 369
——— (1 Sim. & St. 381) 470
Cass *v.* Rudele 272
Casson *v.* Roberts.....36, 116
Castellain *v.* Preston 272
Castle *v.* Wilkinson 380
Cathrow *v.* Eade 197
Catling *v.* Great Northern Rail. Co. 180
——— *v.* King.....30, 33, 34
Cato *v.* Thompson.....193, 352, 374, 428, 522
Caton *v.* Caton 16, 19, 21
Cator *v.* Bolingbroke 266

PAGE

Catt *v.* Tourle 231
Cattell *v.* Corrall.....194, 195
Catton *v.* Wyld..... 479
Cavan (Lady) *v.* Pulteney 510
Cavander *v.* Bulteel..... 320
Cave *v.* Cave 324, 334, 344
—— *v.* Hastings 64
—— *v.* Mackenzie..... 18
Cavendish *v.* Cavendish 128
Cawley *v.* Poole..... 451
Cayley *v.* Walpole..... 55
Central Rail. Co. of Venezuela *v.* Kisch 505, 530, 535
Chadwick *v.* Maden 445
——— *v.* Turner 246, 327, 330
Chalmer *v.* Bradley 140, 197
Chalmers, Ex parte 522
Chamberlain *v.* Lee 478
Chambers *v.* Griffiths 368
——— *v.* Waters 134
Champion *v.* Plummer 33
——— *v.* Rigby..... 138, 140
Chaplin, *Ex parte* 221
Chapman *v.* Day 506
——— *v.* Tanner 29, 263
Charlton *v.* Att.-Gen. 238
Charter *v.* Trevelyan.....137, 138
Chasemore *v.* Richards..... 213
Chattock *v.* Muller 25, 38
Cheetham *v.* Sturtevant 259
Cherry *v.* Bank of Australasia .. 397
——— *v.* Heming..... 2
Chesterfield *v.* Janssen..... 400
Chesworth *v.* Hunt 342
Chichester *v.* McIntyre 46
Chicot *v.* Lequesne 45
Child *v.* Douglas.....226, 227
—— *v.* Stenning (5 Ch. D. 695) 447, 451
——— (11 Ch. D. 82) 511, 513
Childers *v.* Eardley 287
Chilton *v.* Corporation of London 209
Chinnock *v.* Marchioness of Ely..58, 60
Cholmondeley *v.* Clinton 147
Christian, *In the goods of* 19
Christie *v.* Commissioners of Inland Revenue 307
——— *v.* Noble..... 42
——— *v.* Ovington.....257, 285
Christ's Hospital, *Ex parte Governors of* 157
Church *v.* Brown 234
Citizens' Bank of Louisiana *v.* First National Bank..... 398
Clapham *v.* Andrews 342
——— *v.* Shillito 407
Clare *v.* Lamb 439, 499, 506, 520
Clare Hall *v.* Harding 392
Clark *v.* Callow 30
——— *v.* Clark 134
——— *v.* Girdwood 436
——— *v.* Malpas 435, 458, 530
——— *v.* May 281
——— *v.* Lord Rivers 451
——— *v.* School Board for London 186
——— *v.* Smythies 104

PAGE
Clarke, *Ex parte* 50
——— *v.* Dickson 413, 531
——— *v.* Elliott 468
——— *v.* Faux 193, 451
——— *v.* Franklin 236
——— *v.* Grant 425
——— *v.* Mackintosh 406
——— *v.* Moore 463
——— *v.* Palmer 337
——— *v.* Roche 309
——— *v.* Royle 265
——— *v.* Swaile 135
——— *v.* Willott 98, 117, 221
——— *v.* Wilson 468
Clarkson *v.* Hanway 458
——— *v.* Woodhouse 197
Clavering's Case 391
Clay *v.* Rufford 130
—— and Tetley, *Re* .. 147, 488, 489, 490
Claydon *v.* Green 523
Clayton's Case 313
Clayton *v.* Ashdown 455
——— *v.* Corby 209
——— *v.* Illingworth 441
Clegg *v.* Edmondson 463
Clements *v.* Welles 226, 231
Clermont *v.* Tasburgh 365, 413
Clifford *v.* Turrell 423
Clinan *v.* Cooke 18, 25, 27
Clitheroe Estate, *Re* 142
Clive *v.* Beaumont 55, 59, 249
Close *v.* Wilberforce 91
Clough *v.* London and North Western Rail. Co. 413, 525
Clowes *v.* Higginson 428, 452
Cochrane *v.* Robinson 92
——— *v.* Willis 417
Cockburn *v.* Edwards 149
Cockell *v.* Bacon 151
——— *v.* Taylor 459
Cocker *v.* Cowper 10
Cockerell *v.* Cholmeley 129
Cocking *v.* Ward 5, 14
Cockran *v.* Irlam 102
Cockroft, *Re* 269, 274
Cockson *v.* Cock 226
Coddington *v.* Paleologo 522
Cogan *v.* Duffield 436
Colby *v.* Gadsden 399, 462
Cole *v.* Sewell 130
—— *v.* West London Rail. Co. .. 174
—— *v.* White 26
Coleman and Jarrom, *Re* 489, 490
——— *v.* Upcot 54
——— *v.* Winch 340
Coles *v.* Sims 229
—— *v.* Trecothick 16, 17, 18, 102, 134, 458
Collard *v.* Roe 236
——— *v.* Sampson 476
Collen *v.* Wright 104, 397
Collier *v.* Jenkins 372
——— *v.* Mason 46
——— *v.* McBean 476
——— *v.* Walters 476
PAGE
Collingwood *v.* Row 47
Collins *v.* Archer 333
——— *v.* Collins (26 Beav. 306) .39, 40
——— (31 Beav. 346) .. 267
——— *v.* Gripper 502
——— *v.* Maude 197
——— *v.* Stimson 97, 114, 115
Colpoys *v.* Colpoys 422
Colton *v.* Wilson 198, 248
Colyer *v.* Clay 417
——— *v.* Finch 337
Coming, *Ex parte* 29
Commins *v.* Scott 34, 35, 36, 447
Compton *v.* Preston 465
——— *v.* Richards 72, 294
Conolly *v.* Parsons 129
Cood *v.* Pollard 268
Cook *v.* Collingridge 137
—— *v.* Heynes 466
—— *v.* Mayor of Bath 211
—— *v.* Waugh 349
Cooke *v.* Booth 51
—— *v.* Chilcott 89, 228
—— *v.* Clayworth 457
—— *v.* Crawford 123, 124
—— *v.* Oxley 55
—— *v.* Tombs 13, 21
—— *v.* Witton 339
Cooke's Contract, *Re* .. 122, 133, 488, 489
Cookson *v.* Cookson 52
Cooper, *Re* 335, 531
——— and Allen's Contract, *Re* .. 128, 148, 239, 488
——— *v.* Barber 213
——— *v.* Cartwright 281
——— *v.* Crabtree 216
——— *v.* Emery 193
——— *v.* Kynock 476
——— *v.* Macdonald 237
——— *v.* Norfolk Rail. Co. 174
——— *v.* Phibbs .. 417, 437, 520, 528, 533
——— *v.* Smith 21, 62
——— *v.* Trewby 239
——— *v.* Whittingham 485
Coote *v.* Mammon 322
Cooth *v.* Jackson 26, 40
Copper Mining Co. *v.* Beach .. 50, 51
Coppin *v.* Coppin 289
——— *v.* Fernyhough 314
Corbett *v.* Hill 72
Corder *v.* Morgan 150, 286
Cordingley *v.* Cheeseborough 67, 361, 365, 366, 378
Cornfoot *v.* Fowke 386, 387, 388
Cornish *v.* Clark 219
——— *v.* Stubbs 10
Corrall *v.* Cattell 81
Corser *v.* Cartwright 147
Cory *v.* Cory 457
—— *v.* Thames Iron Works Co. .. 479
Cosens *v.* Bognor Rail. Co. 270
Coslake *v.* Till 277
Cosser *v.* Collinge 362
Coster *v.* Turnor 523

PAGE
Costigan *v.* Hastler 451, 460
Cothay *v.* Sydenham 316
Cotton's Trustees and School Board for London, *Re* 130, 133, 488
Cotton *v.* Scudamore 304
Cottrell *v.* Cottrell 167, 296
——— *v.* Hughes 286
——— *v.* Watkins 193
Counter *v.* Macpherson 272
Coupland *v.* Arrowsmith 63
Courtauld *v.* Legh 215
Coutts *v.* Acworth 224
Coventry *v.* London and Brighton Rail. Co. 189
Coward and Adams' Purchase, *Re*.487, 489
Cowell *v.* Chambers 200
Cowles *v.* Gale 277, 523
Cowpe *v.* Bakewell 96, 258
Cox *v.* Bruton 435
—— *v.* Coventon 359
—— *v.* Middleton.....46, 407
—— *v.* Smith..... 457
—— *v.* Willoughby 52
Coxhead *v.* Mullis..... 455
Crabtree *v.* Poole 275
Cracknall *v.* Janson 223, 288, 342
Cragg *v.* Holme..... 457
Crane *v.* Kilpin 258
Cranwell *v.* Mayor of London .. 176
Crawford *v.* Toogood.....278, 279
Credland *v.* Potter..... 328
Crewe *v.* Dicken 123
Cripps *v.* Reade 439, 506
Crockford *v.* Alexander 470
Croft *v.* Lumley 85
Crofton *v.* Ormsby 277
Crompton *v.* Melbourne 128
Crook *v.* Corporation of Seaford .. 28
Croome *v.* Lediard 426, 484
Crosbie *v.* Tooke 52, 448
Crosby *v.* Percy..... 196
——— *v.* Wadsworth 2, 6, 8
Crosse *v.* Lawrence 86
Crossley *v.* Elworthy 219
——— *v.* Lightowler ..211, 212, 213
——— *v.* Maycock 54, 466
Croughton *v.* Blake 195
Crowther *v.* Thorley..... 456
Cruikshank *v.* Duffin 474, 483
Crutchley *v.* Jerningham 120, 467
Cuckfield Burial Board, *Re*..... 177
Cuddon *v.* Tite 96
Cuff *v.* Hall 131
Cuming, *Re* 257
Cumming to Godbolt 33, 487
Cummins *v.* Fletcher 342
Curling *v.* Austin 86, 472, 484
Curriers' Co. *v.* Corbett 295
Curtis *v.* Marquis of Buckingham 470
Cutler *v.* Simons 260, 469, 470
Cutter *v.* Powell 492
Cutts *v.* Thodey 76, 247, 248, 445, 447, 524

D.

PAGE
Dagenham Dock Co., *Re*..... 179
Daking *v.* Whimper..... 221
Dalby *v.* Pullen..... 372
Dale *v.* Hamilton (5 Hare, 369; 2 Ph. 266) ..11, 25
——————— (10 Hare, App. vii.) 164
—— *v.* Lister..... 351
Dames and Wood, *Re*....78, 488, 489
Dance *v.* Goldingham 127
D'Angibau, *Re* 223
Daniel *v.* Adams 100, 127
Daniels *v.* Davison ..49, 50, 68, 260, 320
Dann *v.* Spurrier 392
Darbey *v.* Whitaker 39, 42
Dare Valley Rail. Co., *Re* 44
Darlington *v.* Hamilton .. 68, 79, 373
Darnley *v.* London, Chatham and Dover Rail. Co.....40, 247, 248
Daun *v.* City of London Brewery Co. 339
Davenport *v.* The Queen 85, 517
Davey *v.* Durrant..... 148
Davies *v.* Cooper.....457, 459, 460
——— *v.* Davies 315
——— *v.* Fitton 431
——— *v.* London and Provincial Marine Insur. Co...401, 404
——— *v.* Otty.....24, 25
——— *v.* Sear.....294, 320
——— *v.* Stephens 210
——— *v.* Thomas 315
——— *v.* Wescomb 129
Davis *v.* Harford 447
——— to Jones and Evans 488
——— *v.* Shepherd..... 291
——— *v.* Strathmore 327
——— *v.* Symonds .. 394, 413, 426, 427
——— *v.* Thomas.....48, 51
——— *v.* Tollemache 513
Dawes *v.* Harness..... 413
——— *v.* Tredwell 287
Dawkins *v.* Lord Penrhyn 29
Dawson, *Ex parte* 220
——————— *v.* Bank of Whitehaven . 236
——————— *v.* Brinckman 86, 249
——————— *v.* Dawson 48
Day *v.* Day..... 203
—— *v.* Luhke 277, 523
—— *v.* Newman 459
—— *v.* Wells 418
De Brassac *v.* Martyn 479
De Bussche *v.* Alt 140, 505
Dean *v.* Wilson 164
Dear *v.* Sworder 464, 465
De Hoghton *v.* Money..... 444
De la Salle *v.* Moorat 163
De la Touche's Settlement, *Re* .. 436
De la Warr (Earl) *v.* Miles 209
Deller *v.* Prickett 113
Delves *v.* Delves 165
De Montmorency *v.* Devereux .. 141
Dendy *v.* Simpson..... 292

PAGE
Denew *v.* Daverell 103, 105
Denn *v.* Diamond 307
Denne *v.* Light 370
Dennett *v.* Atherton 511
Denning *v.* Henderson .. 96, 166, 258
Denny *v.* Hancock.....38, 73, 94, 505
Dent *v.* Auction Mart Co. 217
Denton *v.* Donner 135
——— *v.* Stewart 461
Denys *v.* Shuckburgh 438
Depree *v.* Bedborough 115
Deptford Creek Bridge Co. and Beavan, *Re* 93, 368, 488
Devaynes *v.* Robinson 130, 132
Devenish *v.* Brown 177
Deverell *v.* Lord Bolton 249
De Visme *v.* De Visme.....97, 166
Devonshire (Duke of) *v.* Eglin .. 10
Dicconson *v.* Talbot 141, 411
Dicker *v.* Angerstein 150
——— *v.* Jackson 494
Dickinson *v.* Dodds.....55, 56, 57
Dimmock *v.* Hallett..66, 94, 107, 169, 369, 372, 399, 400, 401
Dinham *v.* Bradford 40
Dinn *v.* Grant 117, 261
Ditcham *v.* Worrall 455
Dixon *v.* Astley 251, 469, 470
——— *v.* Eastern and Midland Rail. Co. 270
——— *v.* Gayfere 202, 264
——— *v.* Muckleston 344
Dobell *v.* Hutchinson.....2, 62, 94
——— *v.* Stevens 393, 400, 504
Dobson *v.* Land 147
Dodd *v.* Salisbury Rail. Co..... 171
Doe *v.* Amey 5
—— *v.* Bancks 516
—— *v.* Barnes 199
—— *v.* Bell..... 3
—— *v.* Benjamin 47
—— *v.* Birch 516
—— *v.* Brooks 81
—— *v.* Burton 260
—— *v.* Clark 302
—— *v.* Davidson 194
—— *v.* Hampson 292
—— *v.* Hellard 194
—— *v.* Hellier 203
—— *v.* Hughes 146
—— *v.* Jones 286
—— *v.* Knight 298
—— *v.* Manchester Rail. Co. 184
—— *v.* Moulsdale 286
—— *v.* Pedgriph 22
—— *v.* Phillips 195
—— *v.* Price 286
—— *v.* Pritchard 85
—— *v.* Rees 85
—— *v.* Ross 197
—— *v.* Stanion 260
—— *v.* Stone 288
—— *v.* Sybourn..... 477
—— *v.* Tilbury 308
—— *v.* Truby 301
PAGE
Doe *v.* Weston 308
—— *v.* Wood..... 9
Dolling *v.* Evans 46
Dolman *v.* Nokes 154
Doloret *v.* Rothschild 277
Dolphin *v.* Aylward 221
Domville *v.* Berrington 164
Donnellan *v.* Read 13
Donnison *v.* People's Café Co. .. 35
Donovan *v.* Fricker 260, 533
Dorin *v.* Harvey 464
Dorling *v.* Claydon 474
Dorrett *v.* Meux 198
Doughty *v.* Bowman..... 226
Douglas *v.* Archbutt..... 101
——— *v.* Whitrong 49
Douglass *v.* London and North Western Rail. Co..... 184
Doulton *v.* Metropolitan Board of Works 180
Dover *v.* Buck.....134, 140
Dowell *v.* Dew 26, 28, 448
Dowle *v.* Lucy 164
——— *v.* Saunders 345
Dowling *v.* Pontypool Rail. Co... 171
Downes *v.* Grazebrook 135, 152
Dowson *v.* Solomon 273
D'Oyley *v.* Powis 114
Drant *v.* Vause 47
Draper *v.* Borlace 393
Drapers' Co. *v.* M'Cann 486
Drew *v.* Lord Norbury..... 326
Drewe *v.* Corp 370
——— *v.* Hanson 352
Drinkwater *v.* Ratcliffe 160
Druiff *v.* Parker 427
Drummond *v.* Tracy..... 192
Dryden *v.* Frost 318, 323
Drysdale *v.* Mace.....84, 361, 401
Du Cane, *Ex parte* 153
Duddell *v.* Simpson 77, 78, 524
Dudley *v.* Folliott..... 510
Dudson's Contract, *Re*..... 487
Dugdale *v.* Meadows 240
Duke *v.* Barnell..... 83
Dunbar *v.* Tredennick 136, 141
Duncan *v.* Cafe 110
——— *v.* Topham..... 57
Duncuft *v.* Albrecht 12
Dunlop *v.* Higgins.....56, 57
Dunn *v.* Flood.....127, 128
Dunne *v.* English 135, 137, 410
Duppa *v.* Mayo 6
Duranty's Case 389
Durham (Earl of) *v.* Legard..356, 379, 380
Durrant *v.* Ecclesiastical Commissioners 439
——— and Stoner, *Re* 488, 490
Du Vigier *v.* Lee 340
Dyas *v.* Cruise.....377, 381
—— *v.* Stafford.....21, 418
Dyer *v.* Hargrave..248, 257, 259, 260, 349, 369, 406
Dyers' Co. *v.* King 217

PAGE
Dykes *v.* Blake .. 71, 73, 87, 88, 369, 522
Dyne *v.* Nutley 291
Dyson *v.* Hornby 258

E.

Eadie *v.* Addison 61
Eads *v.* Williams 44, 462, 464
Eager *v.* Furnivall 237
Eagle *v.* Charing Cross Rail. Co.. 186
Eaglesfield *v.* Marquis of Londonderry 338, 396, 397, 438, 502
Eardley *v.* Earl Granville 71
Earle and Webster's Contract, *Re* 127, 487
Early *v.* Garret 528, 530
Easterby *v.* Sampson 226
Eastern Counties Rail. Co. *v.* Hawkes.. 183
——— ——— *v.* Marriage 171
East India Co. *v.* Vincent 391
East London Union *v.* Metropolitan Rail. Co. 494
Eaton *v.* Lyon 51
—— *v.* Sanxter 273
Ecclesall (Overseers of), *Re*..... 155
Eccleshill Local Board, *Re* 179
Ecclesiastical Commissioners *v.* Commissioners of Sewers 181
——— ——— *v.* Kino 217
——— ——— *v.* London and South Western Rail. Co.. 174
——— ——— *v.* North Eastern Rail. Co.. 439
Echliff *v.* Baldwin 470
Eden *v.* Weardale Iron and Coal Co. 445
Edge *v.* Strafford 4
Edgell *v.* Day 110, 111
Edgington *v.* Fitzmaurice ..397, 402
Edmonds *v.* Millett 47
——— *v.* Peake 114, 129
Edmunds *v.* Waugh 205
Edwards *v.* Hall 13
——— *v.* Hodding 111
——— *v.* M'Leay....260, 529, 533, 524
——— *v.* Meyrick 138, 140
——— *v.* West 47, 49
——— *v.* Wickwar.....80, 83
Edwards-Wood *v.* Majoribanks.. 412
Edwick *v.* Hawkes 234
Egerton *v.* Mathews..... 15
Egmont (Earl of) *v.* Smith ..95, 113, 272, 281, 447
Ehrensperger *v.* Anderson 524
Eisdell *v.* Hammersley..... 126
Ekins *v.* Tresham 400
Eland *v.* Baker 154
—— *v.* Eland 315

PAGE
Ellard *v.* Lord Llandaff 412
Elliot *v.* Edwards 266
—— *v.* Ince 275
Ellis *v.* Manchester Carriage Co.. 295
—— *v.* Rogers 374, 492
Elmore *v.* Kingscote..... 38
Else *v.* Barnard 101
—— *v.* Else 80, 169
Elsey *v.* Lutyens 330
Elsom, *Re* 490
Elvy *v.* Norwood 205, 340
Elwes *v.* Maw 74
Elworthy *v.* Belling 164
Embrey *v.* Owen 292
Emery *v.* Grocock ..70, 192, 197, 477
——— *v.* Wase 44
Emma Silver Mining Co. *v.* Grant (11 Ch. D. 918).. 410
——— ——— (17 Ch. D. 122).. 411
——— ——— *v.* Lewis..... 410
Emmerson *v.* Heelis ..6, 99, 102, 368
Empson's Case 288
Engell *v.* Fitch 77, 497
England *v.* Slade 477
English *v.* Murray..95, 350, 357, 367, 372
Enraght *v.* Fitzgerald 257, 258
Ensworth *v.* Griffiths 53
Entwistle *v.* Davis 12
Erlanger *v.* New Sombrero Phosphate Co.....139, 410, 532
Errington *v.* Aynesly 441, 443
——— *v.* Metropolitan District Rail. Co. 171, 173
Erskine *v.* Adeane 14, 425
Esdaile *v.* Stephenson 70, 96, 366
Espin *v.* Pemberton 319, 321, 323
Essex *v.* Baugh 330
—— *v.* Daniell 119, 299, 495
—— *v.* Essex 11, 52
European Bank, *Re* 324
Evans *v.* Bicknell 318, 390
—— *v.* Buck 451
—— *v.* Davis..... 451
—— *v.* Edmonds 404
—— *v.* Jackson 130
—— *v.* Roberts 7
—— *v.* Stratford 48
—— *v.* Tweedy..... 257
Evans' Settlement, *Re* 131
Eversfield *v.* Mid Sussex Rail. Co. 171
Ewing *v.* Osbaldiston 118, 264
Exeter (Marquess of) *v.* Marchioness of Exeter 435
Exton *v.* Scott.....223, 298
Eyre's Estates, *Re*..... 168
Eyre *v.* Burmester 335
Eyston *v.* Simonds 478
Eyton *v.* Denbigh Rail. Co. 178

F.

Fagg's (Sir John) Case 335
Fain *v.* Ayers 302, 513

PAGE
Faine *v.* Brown 418
Fairhead *v.* Southee 418
Fairley *v.* Tuck 236
Falcke *v.* Gray 459
Falkner *v.* Equitable Reversionary Society 128, 148
——— *v.* Somerset Rail. Co. 174
Falmouth (Earl of) *v.* Thomas .. 8
Farebrother *v.* Gibson..350, 359, 372, 406
Farley *v.* Bonham 236, 286
Farmer *v.* Dean 136, 164
Farquhar *v.* Farley 498
Farrer *v.* Lacy, Hartland & Co.. 111, 151
——— *v.* Nightingal 351
Farrow *v.* Rees 316, 318
Faversham Charities, *Re* 156
Fawell *v.* Heelis 266
Fearnside *v.* Flint 205
Feilden *v.* Slater.....231, 233
Fenton *v.* Browne..114, 257, 259, 398, 483
Fenwick *v.* Bulman 445
——— *v.* Reed 444, 448
Ferguson *v.* Tadman 272
——— *v.* Wilson 479
Fergusson *v.* London, Brighton and South Coast Rail. Co. 174
Ferraby *v.* Hobson 139
Ferrand *v.* Corporation of Bradford 172
Ferrars *v.* Cherry 222, 315
Ferrers (Earl) *v.* Stafford Rail. Co. 270
Ferrier *v.* Peacock 394, 505
Fewster *v.* Turner 72, 360
Field, *Re*..... 284
Fife *v.* Clayton 429
Fildes *v.* Hooker 68, 353, 373
Finch *v.* Great Western Rail. Co. 210
—— *v.* Underwood 51, 52
Finnis to Forbes.....155, 487
Firth *v.* Midland Rail. Co.....97, 258
Fleetwood *v.* Green 251
Fletcher *v.* Ashburner 273
——— *v.* Fletcher..... 298
Flight *v.* Barton 69, 362
——— *v.* Bolland 455
——— *v.* Booth..67, 69, 94, 361, 365, 522
Flint *v.* Brandon 443
—— *v.* Woodin 102, 248, 399
Flood *v.* Pritchard 362, 373
Flower and Metropolitan Board of Works 290
——— *v.* Hartopp 86
Fludyer *v.* Cocker 251, 258
Flureau *v.* Thornhill 496, 497
Foligno *v.* Martin 523
Forbes *v.* Peacock 146
Ford and Hill, *Re* 244, 489
—— *v.* Olden 153
—— *v.* Peering 303
—— *v.* Stuart 222
—— *v.* White 312

PAGE
Fordyce *v.* Bridges 125
——— *v.* Ford 248, 364, 370, 415
Forrer *v.* Nash 365, 373, 477, 522
Forster *v.* Abraham 474
——— *v.* Hale 11
——— *v.* Hoggart 150
——— *v.* Manchester Rail. Co... 178
——— *v.* Patterson 203
——— *v.* Rowland 20
Forsyth *v.* Bristowe 288
Fort *v.* Clarke 200, 287
Forteblow *v.* Shirley..... 70
Foster and Lister, *Re* 222
——— *v.* Blackstone..... 344, 345
——— *v.* Charles 503
——— *v.* Cockerell 345
——— *v.* Deacon 272
Fotherby *v.* Metropolitan Rail. Co. 181
Fourth City Building Society *v.* Williams..... 346
Fowle *v.* Freeman..... 61
Fox *v.* Amhurst..... 175
—— *v.* Birch 468, 469
—— *v.* Clarke 291
—— *v.* Hawks 335, 337,
—— *v.* Mackreth.....136, 139
Foxlowe *v.* Amcoats..... 467
Frail *v.* Ellis 266, 323
Frame *v.* Dawson 26
Frampton *v.* Stephens 237
Francis *v.* Hayward..... 215
Franklinski *v.* Ball 461
Franklyn *v.* Lamond.....103, 104
Fraser *v.* Ehrensperger 42
——— *v.* Wood..... 483
Freeland *v.* Pearson 168, 282
Freeman *v.* Cox..... 470
——— *v.* Pope 218
Freer *v.* Hesse 286, 482
—— *v.* Rimmer 74
Freeth *v.* Burr 521
Freme *v.* Wright 83
French *v.* French 219
Frend *v.* Buckley 193
Frere *v.* Moore 339
Fricker *v.* Thomlinson 2
Frith and Osborne, *Re*..... 130
Fritz *v.* Hobson..... 480
Frogley *v.* Earl of Lovelace 11
Fry *v.* Fry 132
—— *v.* Noble..... 236
—— *v.* Porter 313
—— *v.* Tapson 129
Fuller *v.* Abrahams 108
——— *v.* Benett 322, 323
Fullwood *v.* Fullwood 505
Furness *v.* Booth 465
Furniss *v.* Midland Rail. Co. 174
Furnival *v.* Crew 50
Furtado and Jeffries, *Re* 96

G.

Gaby *v.* Driver 110
Gale *v.* Gale 223

PAGE
Gale *v.* Squier 87
Galliers *v.* Metropolitan Rail. Co. 179
Galton *v.* Emuss 108
Games, *Ex parte* 219
——— *v.* Bonnor 201, 476
Gardner, *Ex parte* 276
Garner *v.* Hannyngton 303
Garnett-Orme and Hargreaves' Contract, *Re* 143, 489
Garrard *v.* Frankel 434, 529
——— *v.* Grinling 424
——— *v.* Tuck 197
Gartside *v.* Isherwood 458
——— *v.* Silkstone Coal and Iron Co. 299
Gaskarth *v.* Lowther 39
Gaskin *v.* Balls 231, 232
Gayford *v.* Moffatt 293
Geary *v.* Physic 20
Gedye *v.* Duke of Montrose 277
Gell *v.* Watson 469
General Finance Co. *v.* Liberator Benefit Society 282, 336, 507
George *v.* Milbanke 223
German *v.* Chapman 233
Gerrard *v.* O'Reilly 392
Ghost *v.* Waller 290
Gibbings *v.* Strong 450
Gibbins *v.* Metropolitan Asylum District 55, 59
Gibbons *v.* Caunt 427
Gibbs *v.* Daniel 138, 141
—— *v.* Guild 505
Gibson *v.* Clarke 468
——— *v.* D'Este 533
——— *v.* Holland 21
——— *v.* Ingo 316
——— *v.* Jeyes 137
——— *v.* Spurrier 374
Gilbertson *v.* Richards 53
Gill *v.* Woodfin 450
Gillett *v.* Abbott 197
——— *v.* Rippon 112
Gilliat *v.* Gilliat 74, 107
Gingell *v.* Purkins 306
Glazebrook v. Woodrow 493
Glenny and Hartley, *Re* 489
Gloag and Miller's Contract, *Re* 193, 249, 250, 374
Glover *v.* Coleman 216
Goddard *v.* Jeffreys 67, 360, 418
Godfrey's Trusts, *Re* 285
Godson *v.* Turner 193
Godwin *v.* Francis 20
Golds and Norton's Contract, *Re*.. 258
Goldsmid *v.* Tunbridge Wells Commissioners 213
Goman *v.* Salisbury 427
Goodhart *v.* Hyett 71, 88, 214
Goodisson *v.* Nunn 493
Goodman *v.* Griffiths 62
——— *v.* Sayers 45
Goodright *v.* Cator 143
Goodwin *v.* Fielding 21, 129
Goold *v.* White 84

PAGE
Gordon *v.* Hertford 426
Goring *v.* Nash 441
Gosbell *v.* Archer 17, 21, 62, 116, 449
Gosling *v.* Carter 146
Goss *v.* Lord Nugent 421, 427, 428
Gough *v.* Heatley 466
Gourlay *v.* Duke of Somerset .. 39, 44
Governors for Relief of Widows of Clergymen *v.* Sutton 155
Gowan, *Re* 307
Graham *v.* Campbell 471
——— *v.* Oliver 364, 375
Grand Junction Canal Co. *v.* Shugar 213
Grant *v.* Mills 268
——— *v.* Munt 349, 369, 505
Graves *v.* Wright 117
Gray *v.* Briscoe 509
—— *v.* Fowler 77, 78, 451, 525
—— *v.* Gray 98
—— *v.* Gutteridge 109, 110
—— *v.* Webb 465
Great Northern Rail Co. and Sanderson, *Re* 78, 380, 360, 488
Great Western Rail. Co. *v.* Bennett 173
——————— *v.* Birmingham Rail. Co. 375, 470
——————— *v.* May 188
——————— *v.* Swindon Rail. Co. 172
Greatrex *v.* Hayward 213
Greaves *v.* Ashlin 108
——— *v.* Tofield 254
——— *v.* Wilson 66, 77, 78
Green *v.* Bartlett 105
——— *v.* Low 48
——— *v.* Pole 41
——— *v.* Saddington 14, 23
——— *v.* Sevin 279
——— *v.* Smith 461
Greene *v.* West Cheshire Rail. Co. 443
Greenlaw *v.* King 139
Greenslade *v.* Dare 316
Greenwood *v.* Churchill 97
——— *v.* Rothwell 303
Greetham *v.* Colton 146
Gregory *v.* Gregory 140
——— *v.* Mighell 26, 39, 392
Gresley *v.* Mousley 138, 139, 140
Grierson *v.* Cheshire Lines Committee 182
Griffith, *Ex parte* 221
——— *v.* Spratley 458
——— *v.* Young 14, 23
Griffiths *v.* Hatchard 93
——— *v.* Jones 165, 418
Groom *v.* Booth 128
Grose *v.* West 292
Grosvenor *v.* Green 362
——— (Lord) *v.* Hampstead Rail. Co. 173
Grove *v.* Bastard (2 Ph. 618) 198
——————— (1 De G. M. & G. 69) 96

PAGE
Grover *v.* Hugell 139
Grugeon *v.* Gerrard 298
Guest *v.* Cowbridge Rail. Co. .. 340
——— *v.* Homfray 251
——— *v.* Smythe 164
Gunnis *v.* Erhart 108
Gunston *v.* East Gloucestershire Rail. Co. 181
Gunter *v.* Halsey 26, 28
Gwyther *v.* Allen 158

H.

Hackett *v.* McNamara 130
Hadgett *v.* Commissioners of Inland Revenue 308
Hadley *v.* London Bank of Scotland 470
Haigh *v.* Kaye 25
Haines *v.* Burnett 70
Haldenby *v.* Spofforth 130
Halifax Joint Stock Banking Co. *v.* Sowerby Bridge Town Hall Co. 444
Hall, *Ex parte* (10 Ch. D. 615) .. 13
——— (19 Ch. D. 580).... 221
——— *v.* Betty 193
——— *v.* Byron..... 209
——— *v.* Enderby..... 298
——— *v.* Hallett.....136, 137
——— *v.* Laver 251, 444, 445
——— *v.* May.....123, 482
——— *v.* Noyes 134
——— *v.* Smith.....69, 362
——— *v.* Warren 4, 39, 441, 454
——— Dare's Contract, *Re* ..163, 487
Hallen *v.* Runder 9
Hallett to Martin 488, 489
——— *v.* Middleton 513
Hallows *v.* Fernie 401
Halsey *v.* Grant.....352, 365, 370
Hamer *v.* Sharp..... 127
Hamerton *v.* Rogers..... 341
Hamilton *v.* Buckmaster 476
——— *v.* Royse 313, 315
——— *v.* Terry 63
——— *v.* Wright 134
Hammersmith Ry. Co. *v.* Brand..171, 186
Hammond *v.* Hammond 287
Hampden *v.* Wallis 470
Hampshire *v.* Wickens..... 70
Hanbury *v.* Litchfield 357
Hancox *v.* Spittle 168
Hand *v.* Hall..... 15
Hanley *v.* Pearson 435, 436
Hansen *v.* Maddox 113
Hanslip *v.* Padwick 276, 498
Hanson *v.* Lake..... 484
——— *v.* Roberdeau 103, 104
PAGE
Harcourt *v.* Knowel 335
——— *v.* Ramsbottom 42
Hardaker *v.* Moorhouse 126
Hardiman, *Re* 161
Harding *v.* Grady..... 145
——— *v.* Harding 98
——— *v.* Metropolitan Ry. Co., 180, 181
Hardman *v.* Child 87, 516
Hardwicke (Earl of), *Ex parte* .. 178
——— (Lord) *v.* Vernon 137
Hardwidge, *Re* 490
Hardy *v.* Eckersley 357
Hare *v.* Burges 51
—— *v.* Shearwood 422
Harford *v.* Purrier 273
Hargrave *v.* Hargrave..... 455
Hargreaves *v.* Rothwell 322
Harington *v.* Hoggart..... 109
Harlock *v.* Ashberry 204
Harman and Uxbridge Ry. Co., *Re* 488
Harnett *v.* Baker 82
——— *v.* Yeilding 381, 413, 441
Harper *v.* Faulder..... 318
——— *v.* Hayes 129
Harrington *v.* Price 92
——— *v.* Wheeler..... 462
Harris' Case 56
Harris *v.* Gamble 465
——— *v.* Ingledew 145
——— *v.* Kemble 413, 505
——— *v.* Pepperell 291, 434, 529
——— *v.* Petherick 485
Harrison *v.* Forth 312
——— *v.* Good 233
——— *v.* Guest..... 459
——— *v.* Southcote 264
Harrop's Trusts, *Re* 145
Hart *v.* Hart 197
—— *v.* Swaine..67, 371, 397, 404, 509, 528, 529
Harter *v.* Coleman 343
Hartley *v.* Burton..... 288
Harvey *v.* Barnard's Inn 61
——— *v.* Municipal Building Society..... 347
——— *v.* Philips 197
——— *v.* Shelton 45
——— *v.* Young 399
Haselfoot's Estate, *Re*..... 341
Havens *v.* Middleton 85
Hawkins *v.* Gardiner.....269, 289
——— *v.* Holmes 19
Hawksbee *v.* Hawksbee 202
Hawley and North Staffordshire Rail. Co., *Re*.....45, 182
Haycraft *v.* Creasy.....387, 398, 502
Haydon *v.* Bell 251
Hayes *v.* Bickerstaff..... 510
Hayford *v.* Criddle....68, 69, 71, 373
Haygarth *v.* Wearing 385
Hayne *v.* Cummings 5
Haynes *v.* Haynes 181
Hayter *v.* Tucker 13

PAGE

Haywood *v.* Brunswick Benefit Building Society..53, 227, 228, 231
——— *v.* Cope 412, 441, 459
Hazle's Settled Estates, *Re*..... 142
Head *v.* Diggon 55
Healey *v.* Thames Valley Rail. Co. 187
Heams *v.* Bance 340
Heaphy *v.* Hill 279
Heard *v.* Pilley 18
Hearle *v.* Boteler 266
Hearn *v.* Tomlin 251, 259, 495
Hearne *v.* Teriant 428
Heath *v.* Crealock..192, 287, 288, 334, 335, 513
Heatley *v.* Newton 108, 114, 490
Hebb's Case 55, 56, 57
Henderson *v.* Barnewall 102
——— *v.* Hudson 373
Henkle *v.* Royal Exchange Assurance Co. 427, 433
Henty *v.* Schröder 480, 523
——— *v.* Wrey 512
Heppenstall *v.* Hose 78, 378
Hepworth *v.* Heslop..... 167
Herbert *v.* Salisbury Rail. Co...97, 178
Heriot's Hospital *v.* Gibson 88
Hersey *v.* Gillett 52
Hertford (Marquis of) *v.* Boore .. 462
Hervey *v.* Smith 320
Hesse *v.* Briant 138
Hewison *v.* Negus 222
Hewitt *v.* Loosemore ..318, 319, 323, 337
Hewlins *v.* Shippam 10
Hewson *v.* London and South Western Rail. Co. 174
Hext *v.* Gill 292
Heymann *v.* European Central Rail. Co..... 535
Hey's Will, *Re* 285
Heys *v.* Astley 30
Heywood *v.* Mallalieu..71, 87, 108, 374
Heyworth *v.* Knight..... 61
Hibbert *v.* Bayley..... 103
Hick *v.* Phillips..... 371
Hickes *v.* Cooke..... 153
Hickley *v.* Hickley.....135, 137
Hiern *v.* Mill 317, 318
Higgins and Hitchman's Contract, *Re*..374, 486, 487, 489
——— *v.* Samels 399, 414, 505, 519
Higginson *v.* Clowes .. 62, 64, 108, 423
Highgate Archway Co. *v.* Jeakes. 53
Hiles *v.* Moore 339
Hill, *Ex parte*..... 221
—— *v.* Buckley....128, 356, 365, 375
—— *v.* Midland Rail. Co. 172
—— *v.* Pritchard 126
Hillary *v.* Waller 477
Hillman, *Ex parte* 220
——— *v.* Mayhew..... 354
Hills *v.* Laming..... 288
Hind *v.* Poole..... 152

PAGE

Hind *v.* Whitehouse 102
Hinder *v.* Streeten 484
Hine *v.* Dodd 327
Hinton *v.* Sparkes 98, 115, 118
Hiorns *v.* Holtom 324
Hipgrave *v.* Case...451, 479, 480, 493
Hipkins *v.* Amery..... 317
Hipwell *v.* Knight 75, 278
Hirschfield *v.* London, Brighton and South Coast Rail. Co. 396
Hitchcock *v.* Giddings 417, 520
Hoare *v.* Rennie;..... 522
Hobbs *v.* Midland Rail. Co. 189
—— *v.* Norton 392
Hobday *v.* Peters 138
Hobhouse *v.* Hamilton..... 197
Hobson *v.* Bell 75, 128, 148
Hoby *v.* Roebuck 13
Hodges *v.* Horsfall 63
——— *v.* Earl of Litchfield ..118, 498
Hodgkinson *v.* Crowe 70
Hodgson *v.* Johnson..... 15
Hoggart *v.* Cutts 112
——— *v.* Scott 478
Hoghton *v.* Hoghton 435
Holden *v.* Hayn 445
Holdsworth *v.* Goose 126
Holford *v.* Holford 446
Holker *v.* Porrett 213
Holland *v.* Eyre..... 54
Holliday *v.* Overton 287
Hollins *v.* Verney 207, 210
Holloway *v.* York (2 Ex. D. 333). 354
——— (25 W. R. 627). 449
Holman *v.* Loynes..... 138
Holmes *v.* Bellingham 292
——— *v.* Penney 219
Holt & Co. *v.* Collyer 233
Honck *v.* Muller 522
Honduras Inter-Oceanic Rail. Co. *v.* Lefevre 447
Honeycomb *v.* Waldron 330
Honeyman *v.* Marryatt..55, 60, 61, 278
Honor *v.* Honor..... 436
Honywood *v.* Honywood..... 74
Hood *v.* Lord Barrington 34
—— *v.* North-Eastern Rail. Co. . 443
Hoole *v.* Smith 150
Hooper, *Ex parte* 340
——— *v.* Bourne 188
——— *v.* Clark 226
——— *v.* Smart 357
Hopcraft *v.* Hickman 44
Hope *v.* Booth 97
—— *v.* Hope 260
—— *v.* Liddell 315
Hopgood *v.* Ernest 317
Hopkins *v.* Grazebrook 497
——— *v.* Great Northern Rail. Co.....186, 187
Hopkinson *v.* Rolt..... 339
Hopper, *Re*..... 41
Horne *v.* Wingfield 190
Horrocks *v.* Rigby 357
Horsey *v.* Graham..... 6

PAGE
Horsfall *v.* Garnett 55
——— *v.* Hey 307
Houldsworth *v.* City of Glasgow Bank 386,388, 389, 535
Household Fire Insurance Co. *v.* Grant 57, 143
Howard *v.* Castle 106
——— *v.* Ducane 141
——— *v.* Earl of Shrewsbury.... 291
——— *v.* Maitland 511
——— *v.* Shaw 259, 495
Howarth *v.* Smith 198
Howe *v.* Hunt 479
——— *v.* Smith....114, 115, 117, 118, 451, 456
Howell *v.* George 418, 419, 461
——— *v.* Kightley 85
Howland *v.* Norris 69, 258
Hoy *v.* Smythies 66, 78, 128, 378, 456, 524
Hubbard *v.* Lees 199
Hubert *v.* Treherne 19, 20
Huddleston *v.* Briscoe 58, 59
Hudson *v.* Bartram 278, 525
——— *v.* Buck 61, 517
——— *v.* Temple 78, 278
Hughes, *Ex parte* 139
——— *v.* Coles 206
——— *v.* Jones ..68, 70, 247, 363, 364, 375, 415
——— *v.* Kearney 267
——— *v.* Morris 27
——— *v.* Parker 67
Hughes' Trusts, *Re* 345
Huish's Charity, *Re*..... 477
Hull *v.* Vaughan 261
Humble *v.* Mitchell 12
Hume *v.* Bentley 83
——— *v.* Pocock 83, 386, 397
Humphreys *v.* Green 27
——— *v.* Hollis 444
Humphries *v.* Brogden 214
Hungerford, *Re*..... 178
Hunt *v.* Danvers 511
——— *v.* Elmes 337, 344
——— *v.* Silk..... 531
——— *v.* White 514
Hunter, *Ex parte* 98, 118
——— *v.* Daniel 516
——— *v.* Nockolds 205
——— *v.* Walters..266, 316, 317, 324, 345, 531
Hussey *v.* Horne-Payne ..24, 58, 60, 61, 63, 466, 517
Hutton *v.* Mansell..... 166
Huxtable, *Ex parte* 220
Hyde *v.* Corporation of Manchester..... 176
——— *v.* Skinner 50, 52
——— *v.* Warden.....70, 362
——— *v.* Wrench..... 57
Hyett *v.* Mekin 163

I.

PAGE
Ibbottson *v.* Rhodes 393
Icely *v.* Grew 98, 118, 495
Iggulden *v.* May 50, 51
Imperial Mercantile Credit Association *v.* Coleman 116, 533
Incorporated Society *v.* Richards . 201
Ingle *v.* Richards 134
Ingram *v.* Thorp 399, 505
Inman *v.* Stamp 5
Irby *v.* Irby 341
Ireson *v.* Denn 342, 343
Irnham *v.* Child 422
Isherwood *v.* Oldknow 225
Ivimey *v.* Stocker 213

J.

Jablochkoff Electric Light Co. *v.* M'Murdo 112
Jackson *v.* Duke of Newcastle .. 217
——— *v.* Innes 236
——— *v.* Jackson 42
——— *v.* Lever 271
——— *v.* Lowe 64
——— *v.* Oakshott 77, 488
——— *v.* Oglander 64
——— *v.* Parker 236
——— *v.* Rowe 318
——— *v.* Whitehead 81
Jacob *v.* Kirk 19, 35, 64
James, *Ex parte*..... 139
——— *v.* Lichfield 68, 363, 380
——— *v.* Shore 368
James's Settled Estates, *Re*..... 141
Jameson *v.* Stein 282
Janes *v.* Whitbread 219
Jaques *v.* Millar 46, 480
Jardine, *Ex parte* 291
Jay *v.* Richardson..... 231
Jefferys *v.* Fairs.....399, 417, 460
Jeffrey *v.* Stephens 429
Jenkins *v.* Hiles 472
——— *v.* Jones (2 Giff. 99) ..150, 151
——— (9 Q. B. D. 128).. 513
Jenkinson *v.* Pepys 423
Jenkyn *v.* Vaughan 219
Jenner *v.* Jenner 287
——— *v.* Morris 303
Jennings *v.* Broughton..406, 519, 535
——— *v.* Jordan 343
Jerritt *v.* Weare 510
Jersey (Earl of) *v.* Briton Ferry Dock Co. 178, 270
Jervis *v.* Berridge.....24, 524
——— *v.* White 470
Jervoise *v.* Duke of Northumberland 199
Job *v.* Banister 51
John *v.* Jones..... 127
Johnson, *Re* 219
——— and Tustin, *Re* 190
——— *v.* Barnes 209

PAGE

Johnson *v.* Fesemeyer 138
——— *v.* Johnson 506
——— *v.* Legard 221, 223, 460
——— *v.* Smart 360, 369
——— *v.* Smiley 83
Johnstone *v.* Baber 131
——— *v.* Hall 227
Joliffe *v.* Baker ..354, 388, 403, 500, 503
Jolland *v.* Stainbridge 313
Jolly *v.* Handcock..... 196
Jones, *Re* 142
—— *v.* Barkley 493
—— *v.* Bone 233
—— *v.* Clifford 80, 251, 417, 526, 528
—— *v.* Curling 485
—— *v.* Davies 151
—— *v.* Dyke 101
—— *v.* Edney ..67, 70, 108, 361, 522
—— *v.* Evans 357
—— *v.* Flint 7, 8
—— *v.* Frost 288
—— *v.* Jones (1 Cr. & M. 721) .. 309
———— (8 Sim. 633) 345
—— *v.* Lewis 282
—— *v.* Matthie 148
—— *v.* Mudd..... 257
—— *v.* Nanney 103
—— *v.* Powles 335
—— *v.* Price 122
—— *v.* Rimmer 361, 406, 420
—— *v.* Smith (2 Ves. jun. 376) 340, 342
———— (1 Ph. 244) 222, 319
—— *v.* Stanley 312
—— *v.* Thomas..... 138
—— *v.* Victoria Graving Dock Co. 16, 19, 64
—— *v.* Williams 316
Jordan *v.* Sawkins 422, 427
Jorden *v.* Money 398
Joy *v.* Birch 53
Joyce *v.* De Moleyns 334
Joynes *v.* Statham 422, 423

K.

Kay *v.* Johnson..... 442
—— *v.* Oxley..... 293
Kearley and Clayton's Contract, *Re*..... 487
Keate *v.* Phillips 335, 344
Keates *v.* Cadogan 408, 502
——— *v.* Lyon 227, 230
Keating *v.* Keating 130
Keech *v.* Sandford..... 136
Keeling *v.* Brown 145
Kelk *v.* Pearson..... 217
Kelly, *Ex parte* 221
——— *v.* Webster 3
Kelson *v.* Kelson 223
Kemeys *v.* Proctor..... 102
Kemp *v.* Bird..... 230

PAGE

Kemp *v.* London and Brighton Rail. Co..... 181
——— *v.* Sober.....232, 233
——— *v.* South Eastern Rail. Co.. 171, 178
Kendall *v.* Beckett 478
——— *v.* Hill 70
Kennedy *v.* Green 316, 324
——— *v.* Lee.....56, 58, 59, 63
——— *v.* Panama Mail Co. .. 519
Kenney *v.* Browne 139
Kensit *v.* Great Eastern Rail. Co. 212
Kent *v.* Riley..... 218
Kenworthy *v.* Schofield 102
Keppell *v.* Bailey 228
Kerr *v.* Pawson 374
Kershaw *v.* Kershaw 258
Kerslake *v.* White..... 72
Kettlewell *v.* Watson ..263, 266, 289, 311, 317, 323, 329
Kevan *v.* Crawford 219
Keyse *v.* Powell..... 71
Kidderminster (Mayor of) *v.* Hardwick..... 28
Kilbee *v.* Sneyd 136
Killick *v.* Flexney..... 136
Kimber *v.* Barber 410
Kine *v.* Balfe 26
King's Leasehold Estates, *Re* .. 176
King *v.* Heenan 150
—— *v.* Jones 513, 514
—— *v.* King 260
—— *v.* Wilson....279, 280, 349, 365, 406, 524
Kingdon *v.* Nottle (1 M. & S. 355) 514
———— (4 M. & S. 53). 510
Kingsford *v.* Merry 413
Kino *v.* Rudkin..... 217
Kinsman *v.* Rouse 203, 204
Kirk *v.* Todd 506
Kirkman *v.* Booth..... 101
Kirkwood *v.* Thompson 154
Kirtland *v.* Pounsett 259, 495
Kitchen *v.* Palmer 77
Knatchbull *v.* Grueber..250, 251, 365, 367, 368
Knight *v.* Bowyer 136, 206
——— *v.* Crockford 496
——— *v.* Majoribanks..... 153
——— *v.* Robinson 284
Knott, *Ex parte* 339, 340, 346
——— *v.* Cottee..... 164
Knowles *v.* Michel 23
Kronheim *v.* Johnson 18
Kusel *v.* Watson 47

L.

Lacey, *Ex parte* 134, 135, 139
——— *v.* Hill 235
——— *v.* Ingle 340
Lachlan *v.* Reynolds..... 372
Lackersteen *v.* Lackersteen..... 436
Lacon *v.* Allen 344

PAGE

Lacon *v.* Mertins 261
Ladyman *v.* Grave 215
Laird *v.* Pim 493, 494
Lake *v.* Dean 259
Lamare *v.* Dixon 398, 441
Lane *v.* Debenham 122
Langdale (Lady) *v.* Briggs 303
Langley *v.* Hammond 293
Langridge *v.* Levy 394
Langstaff *v.* Nicholson 264, 303
Lantsberry *v.* Collier.....130, 133
Latimer *v.* Aylesbury Rail. Co... 270
Latouche *v.* Lord Dunsany..... 326
Lavery *v.* Turley 6
Law *v.* Urlwin 130
Lawes *v.* Bennett 47, 49, 273
——— *v.* Gibson 96, 481
Lawrenson *v.* Butler 15, 380, 381
Lawrie *v.* Lees 85, 300
Lawson *v.* Laude 422
Layard *v.* Maud 344
Laythoarp *v.* Bryant (1 Bing. N. C. 421)..... 196
——————————(2 Bing. N. C. 735).. 2, 15, 33
Lea *v.* Whitaker 115
Leach *v.* Mullett 94
Leakins *v.* Clissel. *See* Ekins *v.* Tresham 400
Leathes *v.* Leathes 303
Lechmere *v.* Brasier 477, 523
Leddell *v.* McDougal 398
Lee *v.* Clutton 328
—— *v.* Flood..... 168
—— *v.* Gaskell 9
—— *v.* Howlett 345
—— *v.* Munn..... 110
—— *v.* Risdon 9
—— *v.* Young 157
Leech *v.* Leech 435
—— *v.* Schweder 228, 512
Leedham *v.* Chawner 131
Legal *v.* Miller 426, 427
Legg *v.* Goldwire 436
Legge *v.* Croker 396, 528
Leggott *v.* Barrett 355
——— *v.* Metropolitan Rail. Co. 180, 261
Legh *v.* Haverfield 429
Lehmann *v.* M'Arthur..... 463
Leigh *v.* Ashburton 126
——— *v.* Jack..... 292
Lemaitre *v.* Davis..... 215
Le Neve *v.* Le Neve....311, 312, 323, 326, 327
Lennon *v.* Napper..... 276
Leroux *v.* Brown 2, 16
Leslie *v.* Crommelin 377
——— *v.* Tompson..95, 353, 356, 419
Lester *v.* Foxcroft..... 25
Lesturgeon *v.* Martin 249
Lethbridge *v.* Kirkman 115
Lett *v.* Randall 350, 367
Letts *v.* Hutchins 149
Leuty *v.* Hillas 435

PAGE

Levy *v.* Lindo 277
Lewers *v.* Earl of Shaftesbury .. 479
Lewin *v.* Guest 369
Lewis *v.* Bond 69
——— *v.* Branthwaite..... 71
——— *v.* Hillman 137, 410
——— *v.* South Wales Rail. Co... 258
Leyland *v.* Illingworth 95, 350
Lilford (Lord) *v.* Attorney-General 239
——————— *v.* Powys-Keck..48, 269
Limmer Asphalte Co. *v.* Commissioners of Inland Revenue 306
Lincoln *v.* Wright 24
Lindsay *v.* Lynch 423, 429
Lindsay Petroleum Co. *v.* Hurd.. 415, 530, 535
Lingood *v.* Eade 44
Lippincott *v.* Smyth..... 177
Lister's Hospital, *Re* 156
Lister *v.* Lister 139
Livesey *v.* Harding 303
Livingston *v.* Ralli 41
Llewellyn *v.* Earl of Jersey 291
Lloyd *v.* Collett....276, 461, 518, 523
——— *v.* London, Chatham and Dover Rail. Co..... 232
——— *v.* Rippingale 278
Loaring, *Ex parte* 268
Lock *v.* Furze.....496, 514
Lockhart *v.* Hardy 151
Locking *v.* Parker 147, 203
Loffus *v.* Maw 398
London (City of) *v.* Mitford 51
——————— *v.* Nash 441
——— (Mayor of) *v.* Pewterers' Co. 209, 216
——— and Birmingham Rail. Co. *v.* Winter 425, 429
——— and Brighton Rail. Co. *v.* Fairclough 309
——— and County Banking Co. *v.* Lewis.. 470
——————— *v.* Ratcliffe..275, 314
——— and North Western Rail. Co. *v.* Garnett 233
——— and South Western Rail. Co. *v.* Blackmore..... 189
——— and South Western Rail. Co. *v.* Gomm .. 52, 53, 188, 230, 231, 334
——— and Suburban Building Co. *v.* Field 233
——— Bridge Acts, *Re* 297
——— Land Co. *v.* Harris 354
Long *v.* Bowring 444
—— *v.* Collier 86, 482
—— *v.* Crossley..... 447
—— *v.* Fletcher..... 373
—— *v.* Millar 64
Longmate *v.* Ledger..... 458
Lonsdale *v.* Littledale 45
Loosemore *v.* Tiverton Rail. Co. 71, 171, 185
Lord *v.* Commissioners of Sydney 292
—— *v.* Stephens 272

PAGE
Lovell *v.* Hicks 530
Lovelock *v.* Franklyn 496, 524
Lovesy *v.* Smith 436
Low *v.* Barchard 458
Lowes *v.* Lush 477
Lowndes *v.* Lane 369, 406
Lowther *v.* Carlton 312
——— *v.* Lowther 135, 409
Lowthian *v.* Hasel 341
Loyd *v.* Griffith..... 296
Loyes *v.* Rutherford..... 369
Lucas *v.* Commerford 442
——— *v.* Dennison 204
——— *v.* James.....20, 55, 370
Ludgate *v.* Love.....387, 388
Luff *v.* Lord 135
Luker *v.* Dennis 230, 234
Lumsden *v.* Fraser 273
Lycett *v.* Stafford Rail. Co. 270
Lyddall *v.* Weston 374
Lydiatt *v.* Foach 155
Lyle *v.* Richards 291
—— *v.* Earl of Yarborough ..192, 484
Lyon *v.* Fishmongers' Co. 292
Lys *v.* Lys 160
Lysaght *v.* Edwards..... 256
Lysney *v.* Selby 395, 400
Lytton *v.* Great Northern Rail. Co. 442

M.

McAuliffe and Balfour, *Re* 488
Macbryde *v.* Weekes....248, 277, 279
McCarogher *v.* Whieldon 148
McCarthy *v.* Decaix..... 438
McCreight *v.* Foster (see Shaw *v.* Foster) 275
McCulloch *v.* Gregory (1 K. & J. 286)..79, 120, 191, 506
——————— (3 K. & J. 12) .. 198
Macdonald *v.* Walker 124
Macey *v.* Metropolitan Board of Works..... 186
McGregor, *Ex parte* 153, 164
Macinlay, *Re* 167
Mackay *v.* Commercial Bank of New Brunswick 388
——— *v.* Douglas..... 219
Mackenzie *v.* Coulson 430
McKenzie *v.* Hesketh 356, 418
Mackreth *v.* Marlar 522
——— *v.* Symmons ..29, 263, 264, 266, 267, 268, 312
McLay *v.* Sharp 465
McLean *v.* McKay 228
MacLeod *v.* Jones..... 152
McMurray *v.* Spicer....279, 430, 462, 463, 481
McNamara *v.* Williams 444
McPherson *v.* Watt 137, 410
McQueen *v.* Farquhar..130, 196, 312, 365
Macrory *v.* Scott 63
Maddever, *Re*..... 219

PAGE
Maddison *v.* Alderson..25, 27, 391, 398
——— *v.* Chapman 262
Madeley *v.* Booth 68, 93, 373
Magdalen Hospital *v.* Knotts 156, 316
Magee *v.* Lavell..... 115
Magennis *v.* Fallon 249, 272, 369
Mainprice *v.* Westley 104
Major *v.* Ward 149, 194
Malden *v.* Fyson (9 Beav. 347) .. 484
——————— (11 Q. B. 292) .. 498
——— *v.* Menill 438
Malins *v.* Freeman.....418, 517
Malmesbury (Earl of) *v.* Countess of Malmesbury .. 435
——————— Rail. Co. *v.* Budd.. 45
Malpas *v.* Ackland 315
Maltby *v.* Christie..... 104
Man *v.* Ricketts..... 198
Manby *v.* Cremonini..... 493
Mann *v.* Stephens..... 229
Manners (Lord) *v.* Johnson..... 230
Manning, *Ex parte* 258
——— *v.* Wasdale 209
Manser *v.* Back 67, 101, 418
——— *v.* Dix..... 130
Manson *v.* Thacker 355
Margrave *v.* Le Hooke..... 342
Marine Investment Co. *v.* Haviside 198
Markwick *v.* Hardingham ..202, 204
Marsden *v.* Kent 132
——— *v.* Moore 493
Marseilles Extension Rail. Co., *Re* 323
Marsh, *Ex parte* 153
——— and Earl Granville, *Re*..80, 84, 243, 487, 488
——— *v.* Jelf..... 101
——— *v.* Lee 335, 338, 340
Marshall *v.* Berridge 46
——— *v.* Collett 438
——— *v.* Green..... 7
——— *v.* Powell 276
——— *v.* Sladden..... 130
——— *v.* Watson 470
Marson *v.* London, Chatham and Dover Rail. Co..... 173
Martin *v.* Cotter 72, 362, 364, 374
——— *v.* London, Chatham and Dover Rail. Co. 175, 176, 182
——— *v.* Mitchell..... 15
——— *v.* Pycroft 430, 452
——— *v.* Smith (6 East. 555)..... 493
——————— (L. R., 9 Ex. 50) 5
Martinez *v.* Cooper 318, 337
Martinson *v.* Clowes....152, 153, 164
Martyr *v.* Lawrence 72, 291
Marylebone Improvement Act, *Re* 182
Maryon *v.* Carter 276
Mason *v.* Armitage 3, 108
——— *v.* Broadbent..... 205
——— *v.* Cole 89
——— *v.* Hill 212
——— *v.* Shrewsbury Rail. Co...209, 212, 213
Massey *v.* Sladen 149
Massy *v.* Nanney 307

PAGE
Master *v.* Hansard 227
Mather *v.* Fraser 74
——— *v.* Thomas 284
Mathias *v.* Yetts 408
Matthew *v.* Bowler 263, 264
Matthews *v.* Baxter 457
——— *v.* Cartwright 340
Matthison *v.* Clarke 101
Mattock *v.* Kinglake 494
Maunder, *Re* 45
Maundrell *v.* Maundrell 339
Maw *v.* Topham 381
Mawson *v.* Fletcher.....78, 378
Maxfield *v.* Burton 318, 336
May *v.* May 198
—— *v.* Thomson 59, 60, 61
Mayfield *v.* Wadsley 8, 13
Maynard *v.* Moseley..... 430
Maynard's (Serjeant) Case 506
Meadows *v.* Tanner 107
Meath (Bishop of) *v.* Marquess of Winchester..... 195
Mechelen *v.* Wallace 14
Meek *v.* Chamberlain.....236, 346
Melbourne Banking Corporation *v.* Brougham (4 App. Cas. 156) .. 28
Melbourne Banking Corporation *v.* Brougham (7 App. Cas. 307) .. 153
Mellor *v.* Watkins..... 10
Menzies *v.* Lightfoot 339
Mercer and Moore, *Re* 488, 489
Mercier *v.* Pepperell..... 46
Mersey Steel and Iron Co. *v.* Naylor 521
Mertins *v.* Jolliffe 316
Methuen and Blore's Contract, *Re* 489
Metropolitan Bank and Jones, *Re* 487
——————— Board of Works *v.* McCarthy....186, 187
——————— District Rail. Co. and Cosh, *Re* 188, 488, 489
——————— Rail. Co. *v.* Defries 180, 260
——————— Rail. Co. *v.* Woodhouse 182
——————— Street Improvement Act, 1877 184
Mews *v.* Carr..... 102
Meynall *v.* Surtees 26, 56, 57
Meyrick *v.* Laws 157
Micholls *v.* Corbett 82
Middleton *v.* Greenwood 442, 480
——— *v.* Magnay 98, 261
Midgley *v.* Coppock 96
Midland Counties Rail. Co. *v.* Westcomb 484
——— Rail. Co. *v.* Checkley 292
——————— *v.* Haunchwood Brick and Tile Co. 173, 292
Midland Rail. Co. of Ireland *v.* Johnson 438
Mildmay *v.* Quicke 161
Miles *v.* Jarvis 163
Milford Docks Co., *Re* 494
Mill *v.* Hill 326, 534
Miller *v.* Beal..... 101
PAGE
Milligan *v.* Cooke 353, 357
Mills *v.* Bayley 42
—— *v.* Capel 203
—— *v.* Haywood 462, 464
—— *v.* Jennings 343
—— *v.* Oddy 94
—— *v.* Society of Bowyers..... 45
Milnes *v.* Gery 38, 39, 43, 74
Milward *v.* Thanet 461
Minchin *v.* Nance..... 273
Minet *v.* Leman..... 82
Minor, *Ex parte* 165
Minshull *v.* Oakes..... 226
Minton *v.* Kirwood 167, 286
Mitchell *v.* Darley Main Colliery Co. 485
——— *v.* Hayne 112
——— *v.* Steward..... 232
Moens *v.* Heyworth 502
Moeser *v.* Wisker..... 116
Moffat *v.* Cornelius 42
Moggridge *v.* Jones 494
Mole *v.* Smith 444
Mollett *v.* Brayne 5
Molloy *v.* Sterne 83
Monckton and Gilzean, *Re* 78, 87, 228, 258, 487, 488
Monro *v.* Taylor 482
Montesquieu *v.* Sandys 138
Moody to Yates 85, 190, 246
——— *v.* Corbett 188
——— *v.* Steggles 215
Moore *v.* Bennett 314
——— *v.* Blake 464
——— *v.* Culverhouse 328
——— *v.* Hall 216
——— *v.* Marrable 427, 518
——— *v.* Webster..... 237
——— and Robinson's Banking Co., *Ex parte* 74
More *v.* Mayhow 312
Morecock *v.* Dickins..... 326
Morgan, *Ex parte* 288
———, *Re* 141
——— *v.* Bain 522
——— *v.* Elford 410
——— *v.* Griffith 14, 425
——— *v.* Hunt 510, 511
——— *v.* Metropolitan Rail. Co.. 181
——— *v.* Milman 39, 40, 75, 179
——— *v.* Morgan..... 203
——— *v.* Rhodes 52, 448
——— *v.* Rutson 126
——— *v.* Shaw 467, 468
——— *v.* Swansea Sanitary Authority 257, 285
——— *v.* Worthington 30
Morgan's Settled Estate, *Re* 131
Morison *v.* Turnour 19
Morland *v.* Cook.....228, 320
Morley *v.* Clavering 418
——— *v.* Clifford 209
——— *v.* Cook 75, 77, 191, 524
Morphett *v.* Jones..... 26
Morret *v.* Paske..... 340

PAGE
Morris *v.* Debenham 128, 481
——— *v.* Edgington 510
——— *v.* Glynn 12
——— *v.* Kearsley 191
——— *v.* Morris 131
——— *v.* Wilson 36
Morrison *v.* Universal Marine Insurance Co..... 526
Morse *v.* Merest 39, 40
——— *v.* Royal 135, 140
Mortimer *v.* Bell 106
——— *v.* Capper 271, 460
——— *v.* Orchard 429, 483
——— *v.* Shortall 433, 434, 520
Mortlock *v.* Buller..95, 128, 133, 351, 375, 526
Morton and Hallett, *Re*.....124, 489
——— *v.* Lamb..... 492
Moseley *v.* Simpson 45
Mosely *v.* Virgin 441, 442
Moss *v.* Barton 52
—— *v.* Mills 435
Mostyn *v.* Lancaster..... 126
——— *v.* West Mostyn Coal and Iron Co. 514, 529
Moulton *v.* Edmonds 197
Mountford *v.* Scott 322
Mountfort, *Ex parte*..... 29
Moxhay *v.* Inderwick 87, 92
Mozley *v.* Tinkler 56
Muir *v.* Jolly..... 267
Mulhallen *v.* Marum 526, 533
Mullens *v.* Miller 386, 401, 456
Mullett *v.* Mason 389
Mulliner *v.* Midland Rail. Co. .. 188
Mullings *v.* Trinder 475, 476
Mullins *v.* Hussey..... 169
Mumford *v.* Stohwasser 336
Mundy *v.* Jolliffe 28, 429
Munns *v.* Isle of Wight Rail. Co. 276
Munro *v.* Taylor 86, 273
Murphy *v.* O'Shea..... 135, 410
Murray *v.* Palmer..... 526, 533, 534
——— *v.* Parker..... 422, 431, 432
Muston *v.* Bradshaw 444
Mutlow's Estate, *Re*..... 185
Myddleton *v.* Lord Kenyon 222
Myers *v.* Perigal 12
——— *v.* Watson..... 88, 398

N.

Nairn *v.* Prowse 268
Nash *v.* Ashton 510, 513
—— *v.* Coombs 175
—— *v.* Eads..... 153
—— *v.* Flyn 298
—— *v.* Turner 196
—— *v.* Wooderson 384, 528
National Bank, *Ex parte* 341
National Bank of Australasia *v.* United Hand-in-Hand Co..... 153
PAGE
National Exchange Co. *v.* Drew 386, 388, 396
National Provincial Plate Glass Insurance Co. *v.* Prudential Assurance Co. 217
Navan and Kingscourt Rail. Co., *Re*..... 180
Neal *v.* Mackenzie 381
Neap *v.* Abbott 419
Neath and Brecon Rail. Co., *Ex parte*..... 185
Neave's Trustees, *Re* 487
Neesom *v.* Clarkson (2 Hare, 163)..260, 261, 315
——————— (4 Hare, 97).. 534
Nelson *v.* Barter 112
——— *v.* Bridges 461
——— *v.* Callow 130
——— *v.* Stocker 406
Nelthorpe *v.* Holgate .. 77, 357, 363, 376, 378, 445
——— *v.* Pennyman 164
Nene Valley Drainage Commissioners *v.* Dunkley 63, 350, 481
Nesham *v.* Selby..... 46, 59, 60
Neve *v.* Pennell..... 328, 342, 343
New Brunswick Rail. Co. *v.* Conybeare 388, 528, 530
New Windsor (Mayor of) *v.* Stovell 433, 434
Newcastle's (Duke of) Settled Estates, *Re*..... 142, 144
Newcomen *v.* Coulson 210
Newman, *Re* 115
——— *v.* Newman 335
——— *v.* Rogers 278
——— *v.* Warner 125
Newson *v.* Pender..... 217
Newton *v.* Newton 334
Nicholson *v.* Rose..... 72
——— *v.* Smith 51, 278
Nicoll *v.* Chambers....87, 94, 98, 361
——— *v.* Fenning..... 226, 231, 233
Niell *v.* Morley 455
Nives *v.* Nives.....264, 471
Nixon *v.* Albion Co..... 310
——— *v.* Hamilton 322
——— *v.* Robinson 315
Noble *v.* Edwardes.. 98, 119, 276, 494
—— *v.* Stow 166
—— *v.* Ward 518
Nokes *v.* Lord Kilmorey 278, 280
Norfolk (Duke of) *v.* Worthy 94, 110, 366
Norris *v.* Chambres 262
——— *v.* Le Neve..... 322
——— *v.* Wilkinson 29
Northampton Gas Light Co. *v.* Parnell 41
Northcote *v.* Doughty 455
Northern Counties Insurance Co. *v.* Whipp.....334, 338, 344
Norton *v.* Florence Land Co. 262
——— *v.* London and North Western Rail. Co. 188

PAGE
Nott *v.* Riccard 79, 279
Nouaille *v.* Flight 85, 353
——— *v.* Greenwood 194
Nunn *v.* Fabian..... 27
—— *v.* Hancock 81
Nurse *v.* Lord Seymour 89
Nuttall *v.* Bracewell..... 212

O.

Oakes *v.* Turquand 386, 413, 535
Oceanic Steam Navigation Co. *v.* Sutherberry 129, 357
Ockenden *v.* Henly..... 98, 118
O'Connor *v.* Spaight 13
Ogilvie *v.* Foljambe .. 19, 37, 38, 59, 67, 108, 249, 514
——— *v.* Jeaffreson..... 324, 531
Okill *v.* Whittaker..... 353, 527
Oldfield *v.* Round 349
Oliver *v.* Court 129, 137, 139
Omerod *v.* Hardman....425, 472, 483
Onslow *v.* Lord Londesborough.. 803
Orange, *Re* 353, 361
Ord *v.* Noel.....127, 129, 133, 381
O'Reilly *v.* Thompson 28
Oriental Inland Steam Co. *v.* Briggs..... 55
Orlebar *v.* Fletcher 274
Ormerod *v.* Todmorden Water-works Co. 212
Ormes *v.* Beadel 45
Ormond *v.* Anderson 15
Ormrod *v.* Huth 502
O'Rorke *v.* Bolingbroke 458
O'Rourke *v.* Perceval 381
Osborn *v.* Lea 392
Osborne to Rowlett .. 123, 124, 474, 475, 482, 489
——— *v.* Harvey 250, 469
Osmond *v.* Fitzroy 458
Otter *v.* Lord Vaux 154
Ouseley *v.* Anstruther 166
Owen *v.* Davies 454
—— *v.* Thomas 20, 21, 37, 62
Oxford *v.* Provand 28, 61

P.

Packman and Moss, *Re* 487, 489
Padgett *v.* Binns 466
Page, *Re* 105
—— *v.* Adam..... 78
—— *v.* Cooper 130
Paget *v.* Marshall ..418, 434, 521, 529
Pain *v.* Coombs.....25, 26, 28
Paine *v.* Jones 202
—— *v.* Meller 271, 272
Painter *v.* Newby 78, 357, 378
Palmer *v.* Fletcher 72
——— *v.* Johnson..... 355, 500, 506
——— *v.* Locke..... 475
——— *v.* Temple....98, 115, 120, 524

PAGE
Palmerston (Lord) *v.* Turner....96, 97
Panama Telegraph Co. *v.* India Rubber Works Co. 410, 520
Paramore *v.* Greenslade.....271, 273
Parfitt *v.* Jepson 107
Parker *v.* Clarke..... 223
——— *v.* First Avenue Hotel Co..216, 217
——— *v.* Frith 277
——— *v.* Mitchell..... 207
——— *v.* Staniland 7
——— *v.* Taswell 5, 426
——— *v.* Whyte 231
Parkes, *Ex parte*..... 264
——— *v.* White 134
Parkes' Charity, *Re* 155
Parkin *v.* Thorold.....96, 279, 481
Parkinson *v.* Hanbury..149, 150, 153, 262
Parr *v.* Lovegrove 81, 193, 195
Parrott *v.* Shellard..... 45
——— *v.* Sweetland 265
Parry *v.* Frame 495
Parteriche *v.* Powlet..... 421
Pasley *v.* Freeman 406, 500
Patching *v.* Dubbins..... 229
Paterson *v.* Long (5 Beav. 186) .. 444
——————— (6 Beav. 590)....68, 69, 361, 363
——— *v.* Paterson..... 285
Patman *v.* Harland 231, 319
Paton *v.* Brebner.....260, 353
—— *v.* Rogers 375, 472
Patrick *v.* Milner 119, 278
Paul *v.* Paul 223
Pawson *v.* Watson..... 502
Paxton *v.* Newton..... 442
Payne *v.* Cave 74, 108
—— *v.* Mortimer..... 223
Peacock *v.* Penson..... 89
Peake, *Ex parte* 268
Pearce *v.* Gardner 131, 132
——— *v.* Watts..... 38
Pears *v.* Laing 204
Pearson, *Re*..... 219
——— *v.* Amicable Assurance Office 300
Pease *v.* Coats..... 233
—— *v.* Jackson 339, 346
Pedder, *Ex parte* 153
Peek *v.* Gurney ... 390, 394, 395, 402, 408, 502, 505, 530, 535
—— *v.* Matthews 232
Peers *v.* Ceeley 341
—— *v.* Lambert..... 368
—— *v.* Sneyd..... 482
Pegg *v.* Wisden 48, 247, 248, 279
Peirce *v.* Corf.....64, 102
Pell *v.* Northampton Rail. Co. .. 270
Pember *v.* Mathers 92
Pemberton *v.* Barnes (L. R. 6 Ch. 685)..... 160
——————— (L. R. 13 Eq. 249 163
Pembroke *v.* Thorpe 441

PAGE

Penn *v.* Lord Baltimore 262
Penny *v.* Allen 203
——— *v.* Watts..... 315
Perkins *v.* Bradley..... 322
——— *v.* Ede 169, 368
Perks *v.* Wycombe Rail. Co..182, 270
Perriam, *Re* 355
Perry *v.* Holl 323
—— *v.* Smith 96
Perry-Herrick *v.* Attwood 337
Peter *v.* Nicolls 222, 481
—— *v.* Russell 337
Peters *v.* Lewes Rail. Co. 133, 178
Petley *v.* Eastern Counties Rail. Co. 470
Peto *v.* Hammond 317, 320, 329
Petre *v.* Duncombe 444
Peyton's Settlement, *Re* (30 Beav. 252) .. 127
——————— (L. R. 7 Eq. 463) 157
Phillips *v.* Caldcleugh..70, 80, 374, 522
——— *v.* Commissioners of Inland Revenue 307
——— *v.* Edwards..... 125
——— *v.* Fielding..... 493
——— *v.* Homfray (L. R. 6 Ch. 770) 412
——————— (24 Ch. D. 439) 505
——— *v.* Miller 69, 70, 363
——— *v.* Mullings 224
——— *v.* Phillips 332, 334, 344
——— *v.* Silvester 272, 472
Phillipson *v.* Gibbon ..472, 477, 482, 483
Phipps *v.* Child 249
Phœnix Bessemer Steel Co., *Re*.. 522
Phosphate Sewage Co. *v.* Hartmont 324, 411, 448, 520, 533
Pickering *v.* Dowson 394
Pickett *v.* Loggon 533, 535
Piercy *v.* Young 42
Piggott *v.* Stratton 391, 398
Pigott and Great Western Rail. Co., *Re*.....179, 487, 489
Pilcher *v.* Rawlins 334, 335
Pile *v.* Pile 175
Pilmore *v.* Hood 394
Pimm *v.* Insall 164
Pinchin *v.* London & Blackwall Rail. Co. 171, 174
Pinchon *v.* Chilcott 23
Pincke *v.* Curteis 280
Pinnington *v.* Galland 293
Pinnock *v.* Bailey 345
Pisani *v.* Attorney-General for Gibraltar 135, 138
Pitcairn *v.* Ogbourne 427
Pitt *v.* Jones 160
Plant *v.* Taylor 286
Plasterers' Co. *v.* Parish Clerks' Co. 216
Plumb *v.* Fluitt....314, 317, 318, 335
Pollock *v.* Rabbits 87
Pomfret *v.* Windsor (Lord) ..314, 346

PAGE

Poole *v.* Hill 95, 281, 493
——— *v.* Rudd 114
——— *v.* Shergold 272, 369
Pooley *v.* Quilter 134
Pope *v.* Duncannon 42
—— *v.* Garland 69, 316, 350, 362
—— *v.* Great Eastern Rail Co. .. 469
—— *v.* Roots..... 271
Popham *v.* Eyre 277
Popple and Barratt's Contract, *Re* 486
Pordage *v.* Cole 492
Port of London Assurance Co.'s Case 250
Portal and Lamb, *Re* 489
Porter *v.* Lopes 160
Portman *v.* Mill 361, 367
Portmore *v.* Morris 422
Post *v.* Marsh..... 454
Pott *v.* Todhunter..... 223
Potter *v.* Commissioners of Inland Revenue 307
——— *v.* Duffield..... 35
——— *v.* Sanders.....56, 445, 449
Potts *v.* Smith 512
Poulett (Earl) *v.* Hood..... 297
Poulter *v.* Killingbeck 14
Pounsett *v.* Fuller..... 497
Pountney *v.* Clayton..... 173
Powdrell *v.* Jones 237, 286
Powell *v.* Edmunds 67, 108
——— *v.* Elliot..... 358
——— *v.* Jessopp 12
——— *v.* Powell 77, 169
——— *v.* Smith 420, 426, 438
——— *v.* South Wales Rail. Co... 354
——— *v.* Thomas 392
Pratt *v.* Pratt..... 304
Prees *v.* Coke 153
Prescott *v.* Phillips 212
Preston *v.* Luck 429, 452
——— *v.* Merceau..... 425
Pretty *v.* Solly 374
Price, *Re* 142
—— *v.* Berrington 455
—— *v.* Byrn 140
—— *v.* Dyer 426, 427
—— *v.* Fastnedge 340
—— *v.* Jenkins.....219, 222, 223
—— *v.* Ley 430, 520
—— *v.* Leyburn 23
—— *v.* Macaulay .. 68, 83, 94, 358, 365, 371, 405, 408
—— *v.* North 95
—— *v.* Williams 496
Pritchard *v.* Ovey 39
Propert *v.* Parker 19
Prosser *v.* Rice 312, 346
——— *v.* Watts 81, 196
Pryse *v.* Cambrian Rail. Co...178, 468, 469
Pugh *v.* Golden Valley Rail. Co,.. 172
——— *v.* Heath 204
Pulbrook *v.* Lawes 15
Pullen *v.* Snelus 30
Pulsford *v.* Richards..... 389

PAGE

Pumfrey, *Re* 262
Purser *v.* Darby 485
Pyer *v.* Carter 294
Pym *v.* Campbell 58
Pyrke *v.* Waddingham ..474, 475, 476

Q.

Quenerduaine *v.* Cole 56

R.

Radford *v.* Willis 474, 476, 483
Radnor (Earl of) *v.* Shafto 47, 48
Raggett, *Re* 342
Rains *v.* Buxton 206
Rameshur Singh *v.* Koonj Pattuk 213
Ramsbottom *v.* Gosden 424, 429
Ramsden *v.* Dyson 26, 144, 391
Randall *v.* Errington.....134, 140
——— *v.* Hall 89
Randell *v.* Thompson 42
Ranelagh *v.* Melton 48
Rangeley *v.* Midland Rail. Co. .. 178
Rann *v.* Hughes 2, 432
Rashdall *v.* Ford.....390, 396
Ratcliffe *v.* Barnard 337
Rawlings *v.* Lambert 451
——— *v.* Metropolitan Rail. Co. 182
Rawlins *v.* Wickham ..405, 414, 415, 505, 526, 529, 530
Rawson *v.* Johnson 492
Ray's Settled Estates, *Re* 142, 143
Rayne *v.* Baker 345
Rayner *v.* Preston..... 272
Rede *v.* Oakes 128
Redgrave *v.* Hurd..400, 408, 456, 501, 504, 519, 526, 530, 532, 535
Reese River Silver Mining Co., *Re* 530, 535
——— *v.* Smith 404, 413, 528, 535
Reeves *v.* Gill 282
Regent's Canal Co. *v.* Ware 181, 258, 272
Regina *v.* Cambrian Rail. Co. .. 186
——— *v.* Chorley 211
——— *v.* Eastern Counties Rail. Co. 186
——— *v.* Essex 187
——— *v.* Eton College..... 308
——— *v.* Great Northern Rail. Co. 176
——— *v.* Manchester Rail. Co. .. 175
——— *v.* Metropolitan Board of Works 187
——— *v.* Swindon Local Board.. 96
——— *v.* Vaughan 187
Reid *v.* London and Staffordshire Fire Insurance Co. ..464, 526, 535
Ren *v.* Bulkeley..... 143

PAGE

Renals *v.* Cowlishaw 227, 230
Rendlesham (Lord) *v.* Meux 131
Rennick (Lessee of) *v.* Armstrong 330
Reuss *v.* Picksley 54
Revell *v.* Hussey 271, 459
Rex *v.* Hungerford Market..... 182
—— *v.* Marsh 106, 107
Reynard *v.* Arnold 49
Reynell *v.* Sprye ..404, 407, 413, 504
Reynolds, *Ex parte* 139
——— *v.* Blake 169
——— *v.* Nelson 280
Rhodes *v.* Baker 7
——— *v.* Buckland 151
——— *v.* Ibbetson 80
——— *v.* Thornton 471
Rhys *v.* Dare Valley Rail. Co. .. 185
Rice *v.* Rice 266, 290, 344, 345
Rich *v.* Jackson..... 422
Richards *v.* Porter 21, 62
——— *v.* Revitt 230
——— *v.* Rose 214, 294
——— *v.* Swansea Rail. Co. .. 174
Richardson *v.* M'Causland 264
——— *v.* Silvester 394
——— *v.* Smith..... 43
——— *v.* Williamson 397
——— *v.* Younge 204
Riches, *Ex parte*.....355, 372, 507
Ricket *v.* Metropolitan Rail. Co... 187
Ricketts *v.* Bell 144, 447
Ridgway *v.* Gray....68, 94, 353, 359, 372
——— *v.* Wharton ..18, 30, 59, 60, 62, 64
Ridler, *Re* 219
Rigby *v.* Bennett 214, 294
Right *v.* Bucknell..... 287
Ring *v.* Jarman..... 238
Rippiner *v.* Wright 198
Rippingall *v.* Lloyd 195
Rishton *v.* Whatmore 64, 102
Rivers (Lord) *v.* Adams 209
Roach *v.* Wadham 227
Roberts *v.* Ball 151
——— *v.* Berry..... 276
——— *v.* Croft 344
——— *v.* Marchant 449
——— *v.* Tunstall 140
——— *v.* Wyatt.....191, 517
Robertson *v.* Great Western Rail. Co. 444
——— *v.* Norris 147, 153
——— *v.* Skelton 165, 272
Robinson *v.* Briggs 138, 317
——— *v.* Harman 496, 497
——— *v.* Lowater 146
——— *v.* Musgrove.....94, 366
——— *v.* Page 427, 452
——— *v.* Ridley 139
——— *v.* Trevor.....341, 346, 347
——— *v.* Wall 107
Robson *v.* Collins 426
——— *v.* Flight 123
Roche *v.* O'Brien 140, 141

PAGE

Rock Portland Cement Co. *v.* Wilson 46, 451, 480, 497
Roddy *v.* Williams.....223, 315
Rodwell *v.* Phillips 6, 7, 8
Roe *v.* Archbishop of York 5, 435
—— *v.* Hayley 225
Roebuck *v.* Chadebet 162
Roffey *v.* Shallcross 372
Rogers, *Ex parte* 303
——— *v.* Challis 479
——— *v.* Ingham 439
Rolfe *v.* Chester 341
Rolland *v.* Hart.....321, 324, 327
Rollason *v.* Leon 5
Rolls *v.* London School Board .. 171
—— *v.* Miller..... 233
Rolph *v.* Crouch 510, 514
Rome *v.* Young 266
Rooke *v.* Lord Kensington 287
Rooper *v.* Harrison 286, 339, 340, 345, 392
Roots *v.* Lord Dormer.....99, 368
——— *v.* Snelling..... 400
Roper *v.* Williams..... 232
Rose *v.* Calland 472
—— *v.* Cunynghame 21
—— *v.* Watson..88, 117, 257, 261, 262, 275
Rosenberg *v.* Cook.....76, 83, 188
Rosher *v.* Williams 221
Ross *v.* Estates Investment Co....400, 401
Rosse *v.* Sterling 518
——— (Earl of) *v.* Wainman 292
Rossiter *v.* Miller...34, 35, 59, 60, 61, 62, 63
Rouse and Meier, *Re* 42
Routledge *v.* Grant 55
Rowbotham *v.* Wilson ..214, 229, 291
Rowe *v.* Gray..... 160
—— *v.* May 114, 129
Rowland *v.* Cuthbertson 235
Rowley *v.* Adams 168
Royal Liver Friendly Society, *Re*.. 308
Royal Society and Thompson, *Re*..155, 487
Rugby Charity (Trustees of) *v.* Merryweather 210
Rummens *v.* Robins..... 60
Russel *v.* Russel 29
Russell, *Ex parte* 220
——— *v.* Harford..... 87
Russell Road Purchase Moneys, *Re* 326, 336
Rutland's (Duke of) Settlement, *Re*..... 145
Rutley *v.* Gill..... 166
Rutter *v.* Marriott..... 166
Ryan's Estate, *Re*..... 362

S.

Saffron Walden Building Society *v.* Rayner..... .....322, 345
Sainsbury *v.* Jones 118
——— *v.* Matthews 8
St. Alban's (Bishop of) *v.* Battersby 233
——— (Duke of) *v.* Shore.. 492
St. Germans (Earl) *v.* Crystal Palace Rail. Co..... 270
St. Thomas' Hospital *v.* Charing Cross Rail. Co. 173
Sale *v.* Lambert..... 34
Salisbury (Marquis of), *Re* 486
——— *v.* Hatcher..... 478
Salmon *v.* Cutts 138, 141
Salomons *v.* Pender 105
Saloway *v.* Strawbridge 152
Salter *v.* Metropolitan District Rail. Co..... 174
Sampson *v.* Hoddinott..... 212
Samuda *v.* Lawford 480
Sanders *v.* Benson 91
——— *v.* Sanders 202
Sanderson *v.* Mayor of Berwick-upon-Tweed..... 512
——— *v.* Cockermouth 443
——— *v.* Graves.....23, 24
——— *v.* Walker 134
Sands to Thompson.....205, 488
Sandwick *v.* Great Northern Rail. Co. 212
Sangster *v.* Cochrane 346
Saunders *v.* Annesley (Lord) 528
——— *v.* Dehew 336
——— *v.* Leslie..... 267
——— *v.* Musgrave 260
Saunderson *v.* Jackson 20, 22
Savage *v.* Carroll 26, 28
——— *v.* Foster 392
Savery *v.* King 138, 141
Savile *v.* Savile 169
Savory *v.* Underwood 192
Sawyer and Baring's Contract, *Re* 297, 487
Sayers *v.* Collyer.....232, 479
Schneider *v.* Heath 370, 502
——— *v.* Norris 20
Schreiber *v.* Creed..... 227
Schroeder *v.* Mendl 502
Schwinge *v.* London and Blackwall Rail. Co. 174
Scoones *v.* Morrell..... 482
Scorell *v.* Boxall 8
Scott *v.* Hanson 365, 369, 399
—— *v.* Jackman 93
—— *v.* Nixon 201
Seaforth (Lord), *Ex parte*..... 98
Seal *v.* Claridge 196, 299
Seaman v. Price 14, 23
——— *v.* Vawdrey.....70, 374
Sear *v.* House Property Society .. 234
Searby *v.* Tottenham Rail. Co. .. 293
Seaton *v.* Booth..... 249
——— *v.* Mapp 66, 79, 277
Seddon *v.* Bank of Bolton 216
Selby *v.* Bowie 129, 132
—— *v.* Pomfret 342, 343

PAGE

Sellick *v.* Trevor 79
Sells *v.* Sells 433
Selsey *v.* Rhoades 139
Senhouse *v.* Earle 315
Senior *v.* Hereford 161
Seton *v.* Slade 278, 428
Shackleton *v.* Sutcliffe..71, 88, 93, 350, 368, 374
Shannon *v.* Bradstreet 144, 447
Shardlow *v.* Cotterell 37, 64
Sharland *v.* Leifchild 500
Sharman *v.* Brandt 19
Sharp *v.* Milligan 463
—— *v.* Wright 464
Sharpe *v.* Foy 312, 325
Sharples *v.* Adams 336
Shaw *v.* Bunny 153
—— *v.* Foster.....256, 275, 448
—— *v.* Johnson 192, 205, 286
—— *v.* Neale 339, 340
—— *v.* Stenton 511
—— *v.* Thackray 445, 457
Sheard *v.* Venables 117, 120, 363, 373
Sheerness Waterworks Co. *v.* Polson 282
Sheffield Rail. Co., *Re* 157
Shelburne *v.* Inchiquin 425, 427
Sheldon *v.* Cox 312, 323
Shelton *v.* Livius 108
Shepheard *v.* Walker 464
Shepherd *v.* Hall 306
———— *v.* Keatley 79
Sheppard *v.* Doolan 50, 476
Sherwin *v.* Shakspeare ..96, 195, 246, 261, 481
Sherwood *v.* Beveridge 279
———— *v.* Robins 94, 358
Shillibeer *v.* Jarvis.....26, 28
Shippey *v.* Derrison 21
Shirley *v.* Davis 352
———— *v.* Stratton 352, 412
Shurmur *v.* Sedgwick 222
Siddall, *Re* 456
Sidebotham, *Ex parte* 250, 251
Sidny *v.* Ranger 164
Siegenberg *v.* Metropolitan District Rail. Co. 173
Sikes *v.* Wild 497
Simon *v.* Metivier 102
Simpson *v.* Bathurst..... 143
———— *v.* Crippin 522
———— *v.* Sadd 249
Sinclair *v.* Jackson 205
Skarf *v.* Soulby 218
Skelton *v.* Cole 64
Skerratt *v.* North Staffordshire Rail. Co..... 182
Skinner *v.* M'Douall..... 63
Slade *v.* Rigg..... 151
Slater's Trusts, *Re* 205
Slim *v.* Croucher 390, 405
Slipper *v.* Tottenham Rail Co. .. 176
Small *v.* Attwood ..251, 393, 501, 530
—— *v.* Currie 313
———— *v.* Harding 23

PAGE

Smedley *v.* Varley..... 139
Smith, *Re* 490
——— *v.* Adams.....237, 286
——— *v.* Capron 83, 248
——— *v.* Chadwick....401, 402, 408, 409, 414, 501, 503, 504
——— *v.* Clarke 107
——— *v.* Death 477
——— *v.* Evans..... 266
——— *v.* Field 518
——— *v.* Garland 221, 460
——— *v.* Great Western Rail. Co. 173
——— *v.* Henley 198
——— *v.* Hibbard 263, 266
——— *v.* Hill 205
——— *v.* Hughes 409
——— *v.* Hurst 220, 223
——— *v.* Iliffe 436
——— *v.* Jackson 109, 114, 259
——— *v.* Kay 395
——— *v.* Land and House Property Corporation ..386, 396, 399, 408, 519
——— *v.* Lloyd 468
——— *v.* Neale 54
——— *v.* Nelson 169
——— *v.* Peters 40, 43, 471
——— *v.* Robinson 80
——— *v.* Smith (L. R. 3 Ex. 282).. 188
———————— (L. R. 20 Eq. 500).. 479
——— *v.* Surman 7
——— *v.* Tombs 6
——— *v.* Watts..... 82
——— *v.* Webster..... 22
——— *v.* Wheatcroft 429
——— *v.* Wyley 92, 309
Smith's (Henry) Charity, *Re* 50
Snow *v.* Whitehead 213
Soames *v.* Edge 480
Sorrell *v.* Carpenter 534
Souch *v.* Strawbridge 23
Southampton's (Lord) Estate, *Re* . 345
Southby *v.* Hutt 76, 195
Southcomb *v.* Bishop of Exeter ..251, 279, 280, 463
South Eastern Rail. Co., *Re* 184
Spackman *v.* Great Western Rail. Co. 174
Spalding *v.* Thompson 341
Sparks, Re 485
Sparrow *v.* Oxford Rail. Co. 174
Sparrow's Case 277
Spence *v.* Hogg 445
Spencer *v.* Clarke 317, 345
——— *v.* Marriott..... 511
——— *v.* Pearson 339, 340
——— *v.* Slater 219
——— *v.* Topham 136
Spencer's Case 225, 226, 228
Spiller *v.* Spiller 470
——— *v.* Westlake 494
Spirett *v.* Willows..... 218
Spoor *v.* Green 510
Spradbery's Mortgage, *Re* 283
Spratt *v.* Jeffery 83

PAGE
Spring *v.* Pride 135
Sproule *v.* Prior 269
Spunner *v.* Walsh 362
Spurrier *v.* Elderton 112
——— *v.* Hancock 278
Spurstowe's Charity, *Re* 156
Spurway's Settled Estates, *Re* .. 144
Squire *v.* Campbell 88
Stacey *v.* Elph 134
Stackhouse *v.* Countess of Jersey . 334
Staffordshire Canal Co. *v.* Birmingham Canal Co. 213
Staines *v.* Morris 92
Stamps *v.* Birmingham Rail. Co.. 181
Stanford *v.* Roberts 303
Stanhope *v.* Verney 344
Stanley *v.* Dowdeswell 60
——— *v.* McGauran 70, 402
Stansfield *v.* Hobson 202, 204
——— *v.* Johnson 2
Stanton *v.* Tattershall 94, 359, 370, 522
Stapleton, *Ex parte* 522
Stapylton *v.* Scott 417, 429
Stead's Mortgaged Estates, *Re* .. 205
Steedman *v.* Poole 315
Steel *v.* Prickett 292
Steele *v.* Midland Rail. Co..... 173
Sterry's Estate, *Re* 184
Stevens *v.* Adamson 370
——— *v.* Guppy 198, 251
Stevenson *v.* M'Lean 55, 56
——— *v.* Newnham 413
Stewart *v.* Alliston 94, 352, 366
——— *v.* Smith 280
Stiles *v.* Cowper 28, 144
Stilwell *v.* Wilkins 458
Stocken *v.* Collin 57
Stocker *v.* Dean 53
Stockton Rail. Co. *v.* Brown 171
Stokes *v.* Moore 15, 19
Stone *v.* Commercial Rail. Co. .. 181
—— *v.* Corporation of Yeovil 172, 186
—— *v.* Godfrey 347
Stoneham *v.* London, Brighton and South Coast Rail. Co. 175
Storer *v.* Great Western Rail. Co. 89, 443
Storey *v.* Waddle 354
Story *v.* Windsor 312
Stowell *v.* Robinson 192, 276
Stranks *v.* St. John 514
Stratford *v.* Bosworth 60
Stratton *v.* Pettit 5
Strelley *v.* Pearson 70
Stretton *v.* Great Western Rail. Co.....176, 270
Stronge *v.* Hawkes 393
Stroughill *v.* Anstey 130
——— *v.* Buck 288
Stubbins, *Ex parte*..... 221
Studds *v.* Watson.....21, 63, 64
Stump *v.* Gaby 138, 140, 141
Sturge *v.* Great Western Rail. Co. 489
——— *v.* Starr 438
Suffield *v.* Brown 295
PAGE
Sumpter *v.* Cooper 328
——— *v.* Life 45
Sunderland (Corporation of) *v.* Alcock 96
——— (Freemen of) *Ex parte* 184
Sutherland *v.* Briggs 26, 28
Sutton *v.* Sutton..... 205
——— (Parish of) to Church..155, 488
Swaine *v.* Denby.....131, 161
Swaisland *v.* Dearsley..66, 94, 350, 419
Swansborough *v.* Coventry 72, 295
Swansea (Mayor of) *v.* Thomas .. 91
Sweet *v.* Lee 19
——— *v.* Meredith 523
——— *v.* Southcote 312
Sweetman *v.* Metropolitan Rail. Co. 176
Swift *v.* Jewsbury..... 388
—— *v.* Winterbotham 395, 501
Swinbanks, *Ex parte* 290
Swinburne *v.* Milburn 50, 51
Swindon Waterworks Co. *v.* Wilts and Berks Canal Navigation Co. 212
Swire *v.* Francis..... 388
Sykes *v.* Beadon..... 456
—— *v.* Giles 109, 111
—— *v.* Sheard.....125, 476
Symmons, *Ex parte* 221
Symons *v.* James 66, 83

T.

Taite *v.* Gosling..... 227
—— *v.* Swinstead 131, 132
Talbot *v.* Frere 341
Tamplin *v.* James ..73, 360, 418, 457, 470, 526
Tanner *v.* Byne 223
——— *v.* Florence 314
——— *v.* Smith 77, 78, 524
Tanqueray-Willaume and Landau, *Re* 76, 146, 488, 489
Tapling *v.* Jones.....215, 217
Tapp *v.* Lee 408
Tappenden *v.* Randall 499
Tardiff *v.* Scrughan 264
Tarte *v.* Darby 260
Tasker *v.* Small 257, 444
Tassell *v.* Smith 343
Tate *v.* Williamson 385, 399, 409
Taylor, *Re* 142
——— *v.* Ashton 402, 403, 502
——— *v.* Baker 313, 316
——— *v.* Brown 279, 523
——— *v.* Coenen 219
——— *v.* Gilbertson 90
——— *v.* Grange 161
——— *v.* Jones 56
——— *v.* Meads 300
——— *v.* Poncia 127
——— *v.* Sparrow 303
——— *v.* Stibbert 316
——— *v.* Tabrum..... 132
——— *v.* Waters 10

PAGE

Teal *v.* Auty 8
Teasdale *v.* Braithwaite 222
Teebay *v.* Manchester Rail. Co... 355
Tempest *v.* Kilner..... 12
Tennant *v.* Trenchard .. 136, 162, 164
Tennent *v.* City of Glasgow Bank. 386, 535
Tew *v.* Jones 261
Tewart *v.* Lawson..... 96
Thackeray *v.* Wood 510
Thames Haven Dock Co. *v.* Brymer 493
Theed *v.* Debenham 217
Thicknesse *v.* Lancaster Canal Co. 182
Thomas *v.* Blackman 59, 60
——— *v.* Britnell 146
——— *v.* Brown 36, 116
——— *v.* Buxton 272
——— *v.* Dering. 356, 357, 372, 376, 381
——— *v.* Hayward 226
——— *v.* Howell 13
——— *v.* Powell.....355, 506
——— *v.* Thomas (2 Cr. M. & R. 34) 214
——————— (22 Beav. 341) .. 341
——— *v.* Williams.....131, 144
Thompson *v.* Cartwright..... 324
——— *v.* Ringer 490
——— *v.* Simpson (1 Dru. & War. 459) 315
——————— (2 J. & Lat. 110) 392
——— *v.* Webster 219
Thomson *v.* Anderson 42
——— *v.* Miles 196
——— *v.* Waterlow 293
Thorn *v.* Croft 308
Thornbury *v.* Bevill 22, 56
Thornett *v.* Haines 106
Thornhill *v.* Glover 169
Thorniley, *Re* 466
Thorpe *v.* Brumfitt 294
——— *v.* Holdsworth 339
Thurlow *v.* Mackeson 148
Tid St. Giles' Charity, *Re* 156
Tidey *v.* Mollett 5
Tildesley *v.* Lodge 312
Tillett *v.* Charing Cross Bridge Co. 39
Tilley *v.* Thomas.....259, 276, 277
Tindal *v.* Cobham 258, 468, 470
Titley *v.* Jenyns 342
—— *v.* Wolstenholme 123
Tittenson *v.* Peat 45
Todd *v.* Gee 478
—— *v.* Studholme..... 167
Toft *v.* Stephenson 257, 263, 268
Tolson *v.* Sheard 128
Tomkins *v.* Saffery 220
Tommey *v.* White..... 126
Tone *v.* Preston 215
Toole *v.* Medlicott..... 26
Toppin *v.* Lomas 12
Torrance *v.* Bolton ..66, 70, 117, 169, 261, 420, 519, 527
Toulmin *v.* Steere 322
Tourville *v.* Naish..... 312

PAGE

Towle *v.* Topham 34
Townend *v.* Toker 223, 446
Townley *v.* Bedwell 47
——— *v.* Gibson 194
Townsend *v.* Champernown 192
——— *v.* Wilson 122
——— (Marquis of) *v.* Stangroom 361, 423, 427
Tracey *v.* Lawrence 149
Treloar *v.* Bigge 234
Trevelyan *v.* White 534
Trimlestown (Lord) *v.* Kemmis .. 196
Tritton *v.* Foote..... 50
Trott *v.* Vernon..... 145
Trotter *v.* Maclean 439
Trowell *v.* Shenton 223
Trower *v.* Newcome 369, 386, 398
Truman *v.* London, Brighton and South Coast Rail. Co. 186
Trye *v.* Corporation of Gloucester 224, 301
Tucker *v.* Linger 292
Tulk *v.* Moxhay 229, 230, 231
Tunstall *v.* Trappes 322
Turner and Skelton, *Re* 355, 487, 489, 490
Turner *v.* Goulden 45
——— *v.* Harvey 412, 526
——— *v.* Marriott ..98, 116, 117, 261
——— *v.* Mirfield..... 213
——— *v.* Turner 368, 373
——— *v.* West Bromwich Union 203, 371
Turner's Settled Estates, *Re*..486, 487
Turpin *v.* Chambers 78
Tweedale *v.* Tweedale 317, 323
Tweedie and Miles, *Re* ..130, 132, 487
Twigg *v.* Fifield 165
Twining *v.* Morrice 108, 361, 371
Twycross *v.* Grant..... 505
Twyford *v.* Wareup 355, 361
Twynam *v.* Pickard 91
Twyne's Case 219
Tylee *v.* Webb 318
Tyler *v.* Bevershan 435
Tyrrell *v.* Bank of London ..138, 139
Tyson *v.* Mayor of London 176

U.

Underwood, *Re* 150
Union Bank of London *v.* Ingram 162
Upmann *v.* Forester 485
Upperton *v.* Nickolson..71, 374, 472, 473, 483
Uppington *v.* Bullen..... 138
Urquhart *v.* Macpherson 413

V.

Van *v.* Corpe 69, 361
Vancouver *v.* Bliss 251
Vane *v.* Lord Barnard 513
—— *v.* Vane 206
Varley *v.* Coppard 234

PAGE
Verlander *v.* Codd 63
Vernon *v.* Keys 385, 397
Vickers *v.* Hand 79, 96
——— *v.* Vickers 39, 40, 41, 75
Victoria Freehold Land Society, *Re* 288
Vigers *v.* Pike 406
Vignolles *v.* Bowen 360, 362
Viney *v.* Chaplin 290, 299
Vint *v.* Padgett 343
Vouillon *v.* States 425
Vowles *v.* Miller 293
Vynior's Case 41
Vyse *v.* Foster 137

W.

Waddell *v.* Blockey 410
——— *v.* Wolfe 79, 80
Waddell's Contract, *Re* 487, 489
Waddington *v.* Bristow 6
Wade *v.* Wilson 163
Wadham and North Eastern Rail. Co., *Re* 187
Waite *v.* Bingley 161
Wakeman *v.* Duchess of Rutland 198, 506
Waldron *v.* Sloper 345
Waldy *v.* Gray 324
Wale *v.* Commissioners of Inland Revenue 305
Walhampton Estate, *Re* 151, 343
Walker *v.* Beauchamp 199
——— *v.* Bentley 193
——— *v.* Campbell 138
——— *v.* Constable (1 Bos. & P. 306)..... 499
——————— (2 Esp. 659) . 2
——— *v.* Jeffreys ..277, 462, 463, 464
——— *v.* Moore 497, 498, 499
——— *v.* Shore 131
——— *v.* Smalwood 132
——— *v.* Walker 423
——— *v.* Ware Rail. Co. 270
Wall *v.* Bright 256
—— *v.* City of London Real Property Co. 500
—— *v.* Stubbs 399
Wall's Case 56
Wallis *v.* Sarel 258
——— *v.* Smith 98, 115, 261, 495
Wallwyn *v.* Lee 333
Walmesley *v.* Pilkington 50
Walrond *v.* Hawkins 85
Walsh, *Re* 191
——— *v.* Lonsdale 4, 5
Walter *v.* Maunde 91, 363
Walters *v.* Morgan 412
——— *v.* Webb 203
Want *v.* Stallibrass ..75, 98, 117, 190, 248
Warburton *v.* Farn 126
——————— *v.* Loveland 330
Ward *v.* Carttar 203
PAGE
Ward *v.* Hartpole 138
—— *v.* Robins 212
—— *v.* Ward (L. R. 6 Ch. 789) .. 202
——————— (7 Exch. 838) 211
Warde *v.* Dixon 78, 525
——— *v.* Jeffery 279
Warden *v.* Jones 223
Ware *v.* Egmont (Lord) 311
—— *v.* Gardner 219
—— *v.* Polhill 130
Warlow *v.* Harrison 101, 102, 103, 106
Warn *v.* Bickford 513
Warneford *v.* Thompson 476
Warner *v.* Jacob.....147, 148, 153
——— *v.* Willington.. 33, 34, 35, 54, 57, 64
Warner's Settled Estates, *Re*.... 240, 488, 489
Warren *v.* Richardson ..68, 248, 373
Warwick *v.* Bruce..... 7, 8
Waters *v.* Thorn 135, 138, 141
Watson *v.* Cox 523
——— *v.* King 300
——— *v.* Marston 424, 460
——— *v.* Parker 197
——— *v.* Reid 462, 463
——— *v.* Spratley 12
——— *v.* Toone 139, 140
Watt *v.* Grove 137
Watts *v.* Ainsworth 54
——— *v.* Kelson.....293, 294
——— *v.* Symes..... 282, 342
——— *v.* Watts 181
Wayne *v.* Hanham 151
Weatherell *v.* Geering 448
Web *v.* Paternoster 9
Webb *v.* Austin..... 192
—— *v.* Direct London and Portsmouth Rail. Co..... 459
—— *v.* Hughes 278, 280
—— *v.* Kirby 116, 117
—— *v.* Rorke..... 153
Webber *v.* Lee 11
Webster *v.* British Empire Assurance Co..... 499
——— *v.* Cecil 418, 424
——— *v.* Donaldson..... 272
——— *v.* South Eastern Rail. Co. 270
Weddall *v.* Nixon 198
Wedgwood *v.* Adams (6 Beav. 600) 380, 418, 460
——————— (8 Beav. 103) 380, 484
Weeding *v.* Weeding 47
Weir *v.* Bell 389, 403, 503
Welford *v.* Beazely 16, 17
Weller *v.* Stone 392
Wells, *Re* 142
——— *v.* Chelmsford Local Board 184
——— *v.* Kingston-upon-Hull..5, 10
——— *v.* Maxwell 278, 441
Wentworth *v.* Lloyd..... 140
West *v.* Berney 143
—— *v.* Dobb 234
—— *v.* Errissey 436
—— *v.* Reid 316

PAGE

West Cumberland Iron Co. *v.* Kenyon 214
—— London Commercial Bank *v.* Kitson 396
—— London Commercial Bank *v.* Reliance Building Society 147
—— Midland Rail. Co. *v.* Nixon.. 445
—— of England Bank *v.* Murch.. 147
Western *v.* Macdermott 231
——— *v.* Russell 15, 64, 356
——— Bank of Scotland *v.* Addie 386, 389, 520, 532
Westhall *v.* Hall 369
Westmacott *v.* Robins 356
Weston *v.* Collins 48
——— *v.* Savage ..116, 117, 119, 277, 373, 522
Wetherall, *Ex parte* 29
Whaley Bridge Calico Printing Co. *v.* Green 410
Whatman *v.* Gibson 230, 231
Wheatley *v.* Slade..... 379
——— *v.* Westminster Brymbo Coal Co. 443
Wheeldon *v.* Burrows 294, 295
Wheeler *v.* Collier 36, 107
Wheelton *v.* Hardisty 386, 520
Wheelwright *v.* Walker 131, 143
Whichcote *v.* Lawrence 134, 139, 140
Whitbread *v.* Jordan 317
Whitcomb *v.* Minchin 137
White and Hindle's Contract, *Re* 476, 489
——— *v.* Bradshaw 359, 370
——— *v.* Cuddon ..69, 95, 128, 133, 349, 359, 379, 381
——— *v.* Damon 441, 459
——— *v.* Garden 413
——— *v.* Hill 293
——— *v.* Hillacre..... 343
——— *v.* Nutts..... 272
——— *v.* Proctor 102
——— *v.* Wakefield.... 266, 267, 290
——— *v.* White 435
White's Mortgage, *Re*..... 283
Whitfield *v.* Lequeutre 280
Whiting to Loomes 309, 488
Whittaker, *Ex parte* 398, 520
——— *v.* Whittaker 523
Whittemore *v.* Whittemore .. 93, 94, 361, 364, 367, 377
Whitton *v.* Peacock 202
Wickenden *v.* Rayson 167
Wickham *v.* Evered 468, 470
Widgery *v.* Tepper 137
Wigfield *v.* Potter..... 456
Wigg *v.* Wigg 312
Wiggins *v.* Lord 111, 448
Wight's Mortgage, *Re*..... 328
Wilbraham *v.* Livesey 70
Wilcox *v.* Redhead 61
Wild *v.* Lockhart 167
Wilde *v.* Fort..... 276
——— *v.* Gibson 314, 411, 530
Wildgoose *v.* Wayland 313

PAGE

Wiles *v.* Woodward 288
Wilkes *v.* Bodington 346
Wilkins *v.* Fry 92
Wilkinson *v.* Clements..... 442
——— *v.* Hartley 128
——— *v.* Hull Rail. Co...171, 482
——— *v.* Rogers..... 233
Wilks *v.* Back 299
——— *v.* Davis 38, 39, 40
Willcox *v.* Bellaers 483
Williams *v.* Brisco 58, 60
——— *v.* Burrell 514
——— *v.* Byrnes 33
——— *v.* Chitty 145
——— *v.* Earle 225
——— *v.* Edwards .. 117, 118, 378, 517
——— *v.* Evans (L. R. 1 Q. B. 352) 111
——— (L. R. 19 Eq. 547) 27
——— *v.* Games 160
——— *v.* Glenton 97, 449, 485
——— *v.* Jordan 35
——— *v.* Lake 33
——— *v.* Lambe 333
——— *v.* Phillips 293
——— *v.* Pott 203
——— *v.* Wheeler 2
——— *v.* Williams (17 Beav. 213) ..56, 462
——— (17 Ch. D. 437).... 316
Williams' Estate, *Re* 167
Willie *v.* Lugg 343
Willoughby *v.* Willoughby ..336, 345
Wills *v.* Bridge 308
—— *v.* Stradling.....25, 26
Wilmot *v.* Pike 340, 345, 346
——— *v.* Wilkinson 83
Wilmott *v.* Barber..392, 445, 460, 484
Wilson *v.* Allen 477
——— *v.* Bennett 124
——— *v.* Clapham..... 261
——— *v.* Fuller 388
——— *v.* Furness Rail. Co..... 443
——— *v.* Hart.....230, 231
——— *v.* Kearse 455
——— *v.* Northampton and Banbury Rail. Co. 443, 480
——— *v.* Sewell..... 141
——— *v.* West Hartlepool Rail. Co. 28, 127
——— *v.* Williams.....353, 357
Wilson's Estate, *Re* 174
Wiltshire *v.* Marshall 457
Wimbledon Conservators *v.* Dixon 210
Winch *v.* Winchester.....361, 423
Winchester (Bishop of) *v.* Mid-Hants Rail. Co..... 270
Winder, *Ex parte* 184
Wing *v.* Tottenham Rail. Co. .. 270
Winged *v.* Lefebury..... 273
Winn *v.* Bull 61
Winter *v.* Lord Anson....263, 267, 289

PAGE

Winter *v.* Blades 258
Winter *v.* Brockwell 11
Winterbottom *v.* Ingham 259, 495
Wintle, *Re* 199
Withers *v.* Reynolds..... 521
Withy *v.* Cottle 277, 467
Wittman *v.* Oppenheim 485
Wollaston *v.* Hakewill 197
Wolley *v.* Jenkins..... 132
Wolveridge *v.* Steward..... 92
Wonham *v.* Machin 167
Wood *v.* Beard 5
—— *v.* Bernal 353
—— *v.* Charing Cross Rail. Co... 181
—— *v.* Downes 140
—— *v.* Griffith (Wils. Ch. Cas. 34) 375
———— (1 Sw. 43) .. 275, 448
—— *v.* Keep 400, 528
—— *v.* Lake 9
—— *v.* Leadbitter..... 10
—— *v.* Machu.....279, 467
—— *v.* Midgley..... 29
—— *v.* Richardson 381
—— *v.* Scarth.....37, 63, 423
—— *v.* Silcock 479
—— *v.* Wand..... 213
—— *v.* White 444
Woodbridge, *Re* 490
Woodhouse *v.* Meredith 137, 409
Woodward *v.* Miller 107
Wooler *v.* Knott 234
Woollam *v.* Hearn.....108, 421, 422
Woolley *v.* Colman 162
Worley *v.* Frampton 225
Wormald *v.* Maitland 328
Worth, *Ex parte* 389
Wortham *v.* Lord Dacre 485
Worthington *v.* Morgan..317, 318, 337
———— *v.* Warrington..67, 497, 498
Wortley *v.* Birkhead....335, 339, 340
Wren *v.* Kirton 166
Wright, *Ex parte* 29
——— *v.* Burroughes 91
——— *v.* Howard 212, 277, 371
——— *v.* Rose 150
——— *v.* Stanfield 328
——— *v.* Stavert 5, 10

PAGE

Wright *v.* Williams 214
——— *v.* Wilson 95
Wright's Trustees and Marshall, *Re* 126, 488
——— Trusts, *Re* 145
Wrigley *v.* Lancashire and Yorkshire Rail. Co. 171
Wrout *v.* Dawes 263
Wyatt *v.* Barwell 327
Wycombe Rail. Co. *v.* Donnington Hospital 178, 419
Wyllie *v.* Pollen..... 323
Wyman *v.* Carter 476
Wynne *v.* Griffith 192
Wythes *v.* Lee ..29, 98, 117, 261, 262

X.

Xenos *v.* Wickham 298

Y.

Yates *v.* Farebrother 113
—— *v.* Jack 216
Yem *v.* Edwards 202
York Buildings Co. *v.* Mackenzie 137, 139, 534
York Union Banking Co. *v.* Artley 162
Yorke, *Ex parte* 153
Young and Harston, *Re* 439
——— *v.* Clerk 459
——— *v.* Halahan 433
——— *v.* Roberts 152
——— *v.* Schuler 17
——— *v.* Smith..... 287
——— *v.* Wallingford..... 505
——— *v.* White 111
——— *v.* Young 335, 339
Younge *v.* Duncombe 468

Z.

Zouche (Lord) *v.* Dalbiac 203

TABLE OF STATUTES.

PAGE

18 Ed. I. c. 1 (Quia Emptores) 91
32 Hen. VIII. c. 34 (Reversions, Re-entry) 91, 225
13 Eliz. c. 5 (Fraudulent Deeds) 218
27 Eliz. c. 4 (Voluntary Deeds) 221
29 Eliz. c. 5 (13 Eliz. c. 5 made perpetual) 218
39 Eliz. c. 18 (27 Eliz. c. 4 made perpetual) 221
29 Car. II. c. 3 (St. Frauds) 1
s. 1 ..... 3, 9, 18
s. 2 ..... 3, 4
s. 3 ..... 5, 18
s. 4 ..... 1, 4, 6, 9, 15, 18, 20
s. 17 ..... 9, 12, 18
9 & 10 Will. III. c. 15 (Arbitration) 41
6 Anne, c. 2, Ir. (Irish Registration) 326
7 Anne, c. 20 (Middlesex Registry) 254, 325, 330
8 Anne, c. 14 (Distress for Rent) 260
9 Geo. II. c. 36 (Mortmain Act) 158, 301
55 Geo. III. c. 184 (Stamps) 306
2 & 3 Will. IV. c. 71 (Prescription Act) 207
ss. 1, 2, 3 208
s. 4 ..... 210, 213, 216
ss. 6, 7, 8 207
3 & 4 Will. IV. c. 27 (St. Limitations) 201
s. 12 202
s. 25 ..... 206, 257
ss. 25, 26 206
s. 26 535
s. 28 204
s. 33 193
s. 34 201
s. 41 236
s. 42 205
c. 42 (Interest and Rent) 41, 499
c. 74 (Fines and Recoveries),
s. 34 301
ss. 40, 41 301
s. 46 301
ss. 50—53 301
s. 79 300
ss. 84, 85 196
c. 105 (Dower) 235, 286
s. 2 236
ss. 4—6 235
6 & 7 Will. IV. c. 32 (Building Societies) 346
7 Will. IV. & 1 Vict. c. 26 (Wills Act) 244
c. 28 (Mortgages) 204
1 & 2 Vict. c. 110 (Judgments, &c. Registration) 252
2 & 3 Vict. c. 11 (Judgments, &c. Registration) 252, 253, 254
3 & 4 Vict. c. 82 (Judgments, &c. Registration) 253
c. 92 (Non-parochial Registers) 199

PAGE

8 & 9 Vict. c. 15 (Auctioneer's Licence) 105
c. 18 (Lands Clauses Consolidation Act, 1845) 170
s. 3 171
ss. 6—9 ..... 176, 177
ss. 10, 11 178
s. 18 180
ss. 21—24 ..... 182, 183
s. 49 183
s. 63 183
s. 67 183
s. 68 ..... 172, 186, 187
ss. 71, 72 183
ss. 75—77 183
s. 79 184
ss. 81—83 ..... 183, 184
ss. 84—87 185
s. 92 182
s. 93 174
ss. 95—107 174
ss. 108—122 175
ss. 124—126 176
ss. 127, 128 ..... 188, 189
s. 128 53
c. 20 (Railways Clauses) 172, 173
c. 106 (Real Property Law Amendment),
s. 2 288
s. 3 ..... 4, 15
s. 4 194
c. 112 (Satisfied Terms) 192, 286
c. 118 (Inclosure Act),
s. 84 293
s. 94 194
s. 105 195
10 & 11 Vict. c. 17 (Waterworks Clauses) 172, 173
c. 96 (Trustee Relief Act) 151
13 & 14 Vict. c. 60 (Trustee Act, 1850) 168, 285, 297
c. 97 (Stamps) 306
15 & 16 Vict. c. 55 (Trustee Extension Act, 1852) 168
c. 86 (Chancery Procedure) 162, 163
16 & 17 Vict. c. 51 (Succession Duty),
ss. 2, 3, 4, 10, 33 238
ss. 5, 15, 16, 20, 27, 29, 30, 41, 42, 44 239
ss. 18, 21, 41, 52 241
s. 42 240
c. 70 (Lunacy) 274
c. 137 (Charitable Trusts Act, 1853) 155
17 & 18 Vict. c. 97 (Inclosure Act, 1854) 90
ss. 10—14 90
c. 113 (Locke King's Act) 269, 274
c. 125 (Common Law Procedure Act, 1854) 40, 42
s. 7 42
s. 17 42
s. 26 196
18 & 19 Vict. c. 15 (Judgments, &c. Registration) 253, 254
c. 124 (Charitable Trusts, Amendment) 155, 156
20 & 21 Vict. c. 77 (Probate) 198, 246
21 & 22 Vict. c. 27 (Lord Cairns' Act) 478
22 & 23 Vict. c. 35 (Lord St. Leonards' Act),
s. 3 91
ss. 4—9 85
s. 10 90
s. 12 196
s. 13 129
ss. 14—18 147
s. 21 289
s. 22 253

PAGE

23 & 24 Vict. c. 38 (Judgments, &c. Registration) 253
c. 106 (Lands Clauses Amendment) 178
c. 126 (Common Law Procedure Act, 1860) 85
c. 136 (Charities) 155
c. 145 (Lord Cranworth's Act),
ss. 1, 2 100
ss. 11—24 148
25 & 26 Vict. c. 89 (Companies Act, 1862) 19
s. 67 19
ss. 95, 133, 151 100
25 & 26 Vict. c. 108 (Confirmation of Sales) 129
27 & 28 Vict. c. 56 (Auctioneer's Licence) 105
c. 112 (Judgments, &c. Registration) 253, 340
28 & 29 Vict. c. 104 (Crown Debts, Registration) 253
30 & 31 Vict. c. 48 (Sale of Land by Auction Act) 73, 106, 165
c. 69 (Locke King's Act Amendment) 269, 274
31 & 32 Vict. c. 40 (Partition Act, 1868) 159, 160, 161, 165, 168
32 & 33 Vict. c. 71 (Bankruptcy Act, 1869), s. 91 220
c. 110 (Charities) 155
33 & 34 Vict. c. 97 (Stamp Act, 1870),
s. 3 305
s. 8 307
s. 10 306
ss. 15, 16, 17 ..... 309, 310
s. 70 307
ss. 71—73, 75 306
ss. 74—78 308
s. 94 307
34 & 35 Vict. c. 41 (Gasworks Clauses Act, 1871) 53
36 & 37 Vict. c. 66 (Judicature Act, 1873),
s. 24, sub-s. 7 479
s. 25, sub-s. 2 206
s. 34 449
37 & 38 Vict. c. 42 (Building Societies Act, 1874),
s. 41 308
s. 42 346
c. 57 (Statute of Limitations, 1874) 201
s. 1 202
ss. 2—7 203
ss. 8, 9 ..... 204, 268
s. 10 206
c. 62 (Infants' Relief Act) 455
c. 78 (Vendor and Purchaser Act, 1874),
s. 1 193
s. 2 ..... 84, 93, 194, 197, 200, 246, 302
s. 3 129
s. 4 283
s. 5 283
s. 7 341
s. 8 ..... 246, 330
s. 9 485
38 & 39 Vict. c. 55 (Public Health Act, 1875) 53
ss. 175, 176 53
c. 87 (Land Transfer Act, 1875),
s. 48 ..... 257, 283
s. 83 308
s. 127 255
s. 129 341
39 & 40 Vict. c. 17 (Partition Act, 1876) 161
40 & 41 Vict. c. 18 (Settled Estates Act, 1877) 130, 163
c. 34 (Locke King's Act, Amendment) 269, 274, 449
41 & 42 Vict. c. 31 (Bills of Sale Act, 1878) 9

PAGE

44 & 45 Vict. c. 41 (Conveyancing Act, 1881),
s. 2 ..... 150, 152
s. 3, sub-s. 1 ..... 194, 246
sub-s. 2 194
sub-s. 3 ..... 79, 83, 157, 246
sub-s. 4 84
sub-s. 5 84
sub-s. 6 ..... 92, 190, 195, 245, 302
sub-s. 7 191
sub-s. 11 79
s. 4 ..... 274, 285, 449, 485
s. 5 167
s. 6 295
s. 7, sub-s. 1 ..... 295, 509, 512
sub-s. 2 296
sub-s. 3 296
sub-s. 5 297
sub-s. 6 508
s. 8 299
s. 9, sub-s. 1 ..... 302, 303
sub-s. 9 ..... 302, 303
s. 10 91
s. 14 85
s. 16 303
s. 17 343
s. 18 446
s. 19 ..... 148, 150
s. 20 150
s. 21 ..... 147, 150, 151
s. 22 150
s. 25 162
s. 30 ..... 152, 283
s. 35 ..... 66, 99
s. 36 290
s. 45 ..... 90, 366
s. 46 299
ss. 49, 50, 51 289
s. 54 290
s. 55 ..... 266, 290
s. 56 290
s. 61 152
s. 63 295
s. 66 157
s. 70 163
s. 71 148
44 & 45 Vict. c. 44 (Solicitors' Remuneration) 105, 191
c. 59 (Statute Law Revision) 478
45 & 46 Vict. c. 15 (Commonable Rights) 175
c. 38 (Settled Land Act, 1882),
s. 2 ..... 141, 143
s. 3 ..... 142, 194
s. 4 ..... 100, 129, 142
s. 5 ..... 143, 145
s. 6 142
s. 15 144
s. 16 90
s. 17 ..... 130, 144
s. 20 144
s. 21 ..... 156, 158
s. 22 ..... 145, 156
s. 31 ..... 144, 446
s. 32 183
s. 33 156
s. 37 144
s. 38 143

PAGE

45 & 46 Vict. c. 38 (Settled Land Act, 1882)—*continued.*
ss. 39, 40 145
s. 45 143
s. 50 ..... 142, 143
s. 51 177
s. 53 141
s. 54 145
s. 56 244
s. 58 ..... 141, 446
ss. 59—62 142
s. 60 157
45 & 46 Vict. c. 39 (Conveyancing Act, 1882),
s. 2 254
s. 3 312
s. 7 300
s. 8 299
s. 9 299
c. 75 (Married Women's Property Act, 1882),
s. 1 455
s. 2 300
s. 5 300
c. 80 (Allotments) 155
46 & 47 Vict. c. 18 (Charity Commissioners), s. 8 155
c. 49 (Statute Law Revision) 478
c. 52 (Bankruptcy Act, 1883) 100, 119
s. 37 119
ss. 47, 48 220
s. 50 ..... 154, 297
s. 54 154
s. 55 ..... 274, 449
s. 56 ..... 100, 154
s. 144 308
c. 61 (Agricultural Holdings) 9
47 & 48 Vict. c. 18 (Settled Land Act, 1884),
s. 5 143
s. 6 244
s. 8 142
c. 54 (Yorkshire Registries),
s. 4 330
s. 7 ..... 267, 329
s. 11 ..... 246, 330
s. 12 331
s. 14 ..... 326, 330
s. 15 326
s. 16 331
s. 17 330
ss. 20—23 255
s. 28 255
s. 51 327
c. 61 (Judicature Act, 1884) 168, 286

SALES OF LAND.

CHAPTER I.

THE STATUTE OF FRAUDS.

SECT.		PAGE
1.	*Contracts within the Statute*	1
2.	*Interests in land*	3
	i. *Leases and agreements for leases*	3
	ii. *Lodgings*	5
	iii. *Tenancy from year to year*	5
	iv. *Produce of the soil*	6
	v. *Fixtures*	8
	vi. *Licences*	9
	vii. *Land held for partnership purposes*	11
	viii. *Shares in companies*	12
	ix. *Rent*	13
3.	*Collateral agreements*	13
4.	*Signature of the agreement*	15
	i. *What is a sufficient signature*	15
	ii. *Signature by a witness*	17
	iii. *Signature by an agent*	18
	iv. *Position of signature*	19
	v. *Form of signature*	19
5.	*What is a sufficient memorandum or note*	20
6.	*Exceptions from the Statute*	23
	i. *Action on executed agreement*	23
	ii. *Fraud*	24
	iii. *Part performance*	25
	iv. *Equitable mortgage by deposit*	29
	v. *Vendor's and purchaser's liens*	29
7.	*Defence of the Statute, how raised*	29

SECT. 1.—*Contracts within the Statute.*

BY the fourth section of the Statute of Frauds (29 Car. II. c. 3), it is enacted, that no action shall be brought upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. Statute of Frauds, s. 4.

The object of the Statute of Frauds was to substitute the

Chap. I. s. 1.

certainty of written evidence for the uncertainty of oral evidence of contracts: *Bailey* v. *Sweeting*, 9 C. B. N. S. 843, 862.

General effect of the section.

This section does not provide that a parol contract for the sale of lands shall be absolutely void; it merely takes away the remedy, unless the contract is evidenced by writing signed by the party to be charged: *Leroux* v. *Brown*, 12 C. B. 801; and see *Crosby* v. *Wadsworth*, 6 East, 602; *Fricker* v. *Thomlinson*, 1 M. & Gr. 772. And it has been held, in a case under the 17th section, that the statute relates to procedure only, or, in other words, forms part of the *lex fori* and not of the *lex loci*; and, accordingly, that a contract, valid according to the law of the place where it was made, but not in accordance with the Statute of Frauds, could not be enforced by action in England: *Leroux* v. *Brown*, 12 C. B. 801. See, however, *Williams* v. *Wheeler*, 8 C. B. N. S. 299, 316.

Parol contract evidenced by writing.

The effect of the statute will probably be more easily understood when it is remembered that, according to the common law, which is not altered in this respect by the Statute of Frauds, there is no such thing as a contract in writing unless it be under seal. Where the terms of a contract are reduced into writing, a previous parol contract to the same effect is always supposed to have existed; the writing being merely evidence of the contract and not the contract itself: see *Dobell* v. *Hutchinson*, 3 Ad. & E. 355. "All contracts are, by the laws of England, distinguished into agreements by specialty and agreements by parol; nor is there any such third class as contracts in writing. If they be merely written, and not specialties, they are parol."—Per Skynner, C. B.: *Rann* v. *Hughes*, 7 T. R. 351. See *Alderton* v. *Archer*, 14 Q. B. D. 1.

Signature by one party.

These considerations explain how the agreement may be in writing, and signed by only one of the parties; for "the agreement is in fact completed before either party is called upon to sign": *Laythoarp* v. *Bryant*, 3 Scott, 238, 250.

It seems that an agreement under seal is not within the statute: *Cherry* v. *Heming*, 4 Exch. 631.

Sales by auction within the statute.

It has been long settled that a sale by auction, as well as by private contract, is subject to the provisions of this statute: *Stansfield* v. *Johnson*, 1 Esp. 101; *Walker* v. *Constable*, 2 Esp. 659;

Buckmaster v. *Harrop*, 7 Ves. 341; *Blagden* v. *Bradbear*, 12 Ves. 466; *Mason* v. *Armitage*, 13 Ves. 25.

Sales by the Court.

Where there is no danger of fraud or perjury, the Court has considered the agreement outside the statute; and, accordingly, a sale by the Court binds the purchaser without his signature: *Att.-Gen.* v. *Day*, 1 Ves. sen. 218. But the ordinary conditions of sale now employed by the Court require the purchaser, at the time of sale, to subscribe his name and address to his bidding: R. S. C. 1883, App. L. No. 15. See also Ord. LI.

Sect. 2.—*Interests in Land.*

What are interests in land within the statute.

The words "any interest in or concerning" lands, tenements or hereditaments, are perfectly general; and where anything is done which substantially amounts to a sale or parting with an interest in land, the contract is within the 4th section of the Statute of Frauds: *Kelly* v. *Webster*, 12 C. B. 283, 290.

Agreement for a lease.

An agreement for a lease has always, under the 4th section, been required to be in writing; but where there is no writing, if the tenant enters and pays rent, he becomes a tenant from year to year on the terms of the parol lease: *Doe* v. *Bell*, 5 T. R. 471.

Lease.

The first section of the Statute of Frauds provides, that all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only; and the second section makes an exception in favour of leases not exceeding the term of three years, at a rent amounting to two-thirds of the full improved value of the thing demised.

There is thus an apparent inconsistency between the two provisions of the statute which relate to leases, because while a

Chap. I. s. 2.

parol lease for three years is good under the 1st, an agreement for the same is invalid under the 4th section. The following explanation is given by Bayley, B., in a leading case on the subject:—"The effect of the Statute of Frauds, as far as it applies to parol leases not exceeding three years from the making, is this, that the leases are valid, and that whatever remedy can be had upon them, in their character of leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession": *Edge* v. *Strafford*, 1 Cr. & J. 391, 397.

Certain leases to be by deed.

By the 3rd section of the Act to Amend the Law of Real Property (8 & 9 Vict. c. 106), leases which were previously required to be in writing are declared to be void at law unless made by deed. But Courts of equity, liberally interpreting as valid agreements what Courts of law regarded as void leases, frequently gave relief by decreeing specific performance; and now, since the Judicature Act, when possession has been taken under an agreement, "there are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted."—Per Jessel, M. R.: *Walsh* v. *Lonsdale*, 21 Ch. D. 9.

Summary.

The subject of leases and agreements for leases being thus somewhat complicated, the following summary of the present law may be found convenient:—

1. A lease for a term not exceeding three years, at a rent of two-thirds of the full improved value, may be made by parol: 29 Car. II. c. 3, s. 2.
2. But an agreement for such a lease is void if not in writing: *Ibid.* s. 4.
3. When the term exceeds three years, or the rent is less than two-thirds of the full improved value, the lease must be under seal: 8 & 9 Vict. c. 106, s. 3.
4. An agreement in writing to grant a lease for any term, however long, is valid, and will be specifically enforced: see *Hall* v. *Warren*, 9 Ves. 605.

5. An instrument in writing which purports to demise, but which, not being under seal, is void as a lease, will be construed as an agreement, and specific performance will be decreed: *Parker* v. *Taswell*, 2 De G. & J. 559; and an action lies for not accepting the lease: *Bond* v. *Rosling*, 1 B. & S. 371. See also *Tidey* v. *Mollett*, 16 C. B. N. S. 298; *Hayne* v. *Cummings*, *Ibid.* 421; *Rollason* v. *Leon*, 7 H. & N. 73; overruling *Stratton* v. *Pettit*, 16 C. B. 420.
6. An action may be brought after the determination of the term for breach of the stipulations contained in a void demise: *Martin* v. *Smith*, L. R. 9 Ex. 50.
7. Entry and payment of rent under a void lease or agreement constitutes a tenancy from year to year: *Doe* d. *Thomson* v. *Amey*, 12 Ad. & E. 476; *Wood* v. *Beard*, 2 Ex. D. 30; Woodfall, 206.
8. An agreement for a lease, which is capable of being specifically performed, now confers on both parties the same rights as a lease under seal: *Walsh* v. *Lonsdale*, 21 Ch. D. 9.

Surrenders.

The third section of the statute requires all surrenders of leases to be in writing; and accordingly the mere cancellation of a lease will not amount to a surrender of the term thereby created: *Roe* d. *Berkeley* v. *Archbishop of York*, 6 East, 86.

Lodgings.

An agreement to let lodgings is one which requires to be in writing: *Edge* v. *Strafford*, 1 Cr. & J. 391. See also *Inman* v. *Stamp*, 1 Stark. 12; 2 Sel. N. P. 779. But an action may be maintained on a parol agreement for board and lodging in a boarding-house, no room being specified: *Wright* v. *Stavert*, 2 E. & E. 721; or for the repair of a ship in a dry-dock: *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402.

Tenancy from year to year.

The statute, though it does not extend to the creation of a tenancy from year to year, requires an assignment (*Botting* v. *Martin*, 1 Camp. 317) and a surrender (*Mollett* v. *Brayne*, 2 Camp. 103) of such an interest to be in writing.

Transfer of tenancy from year to year.

A contract to give up a tenancy from year to year, and procure another person to be accepted tenant, is a contract for the sale of an "interest in land"; and, even if a parol contract of

Chap. I. s. 2.

such a nature be *executed* on one side by the surrender of the tenancy and the acceptance of the new tenant, no action will lie for the consideration: *Cocking* v. *Ward*, 1 C. B. 858. But where the consideration for the delivery of certain premises consisted of the release of a debt, it was held, in an action for the recovery of the debt, that the performance of the contract by the defendant could be pleaded in satisfaction: *Lavery* v. *Turley*, 6 H. & N. 239. So also an agreement by a lessee to quit possession of his farm on a certain day, paying all outgoings, in consideration of a sum of money and of the purchase by the incoming tenant of certain articles at a fair valuation, is within the statute: *Smith* v. *Tombs*, 3 Jur. 72; *Buttemere* v. *Hayes*, 5 M. & W. 456.

Contract to obtain an interest in land for another.

A contract whereby one person agrees to procure for another an interest in land is within the statute. Thus, in *Horsey* v. *Graham* (L. R. 5 C. P. 9), it was held that an agreement by a public-house broker "to get the lease and everything for 60*l.* cash," he himself having no interest in the public-house, required to be in writing under the 4th section of the Statute of Frauds.

Produce of the soil.

The question whether a contract for the sale of timber, crops, or other produce of the soil, is one within the Statute of Frauds, has been much discussed, and is one of considerable difficulty; for "no general rule is laid down in any one of the cases that is not contradicted by some other."—Per Lord Abinger: *Rodwell* v. *Phillips*, 9 M. & W. 501. This conflict of authority seems to have chiefly arisen from some uncertainty as to the time when the subject-matter of the contract was to be ascertained. The sale of unripe produce to be delivered at maturity evidently conferred on the purchaser the benefit of the soil while his crop was ripening, and the earlier decisions treat this as an interest in land; while the later ones seem to proceed on the principle that the contract is, in such cases, to deliver chattels to be ascertained at a future time. The following statement is taken from the notes to *Duppa* v. *Mayo*, 1 Wms. Saund. 394:—

"It has been held in several cases that a sale of *growing* crops is a sale of an interest in land within this section: *Waddington* v. *Bristow*, 2 Bos. & P. 452; *Crosby* v. *Wadsworth*, 6 East, 602; *Emmerson* v. *Heelis*, 2 Taunt. 38; but it is otherwise where the

crops have arrived at maturity at the time of sale, or are to be taken away immediately: *Parker* v. *Staniland*, 11 East, 362; *Warwick* v. *Bruce*, 2 M. & S. 205. The principle of these decisions appears to be this—that whenever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation, and from the nutriment afforded by the land, the contract is to be considered as for an interest in land."

This doctrine, as the learned author remarks, has been materially qualified by later decisions, and the following propositions are an attempt to classify the existing law on the subject:—

Immediate delivery.

1. A contract for the *immediate* delivery of something affixed to the land is not within the statute: *Parker* v. *Staniland*, 11 East, 362; and it will make no difference whether the crop is to be reaped by the seller or the buyer, for in the latter case the buyer will take a right to come upon the land, but will have no interest in the soil: *Parker* v. *Staniland*, *ubi supra*; *Marshall* v. *Green*, 1 C. P. D. 35. d. Lavery v. Purcell, un. 60 p. 47.

This proposition holds good whether the contract relates to *fructus industriales* (*e. g.* corn, potatoes, &c., which are produced by annual labour): *Jones* v. *Flint*, 10 Ad. & E. 753; or to the almost spontaneous produce of the soil, as timber: *Smith* v. *Surman*, 9 B. & C. 561; *Rhodes* v. *Baker*, 1 Ir. C. L. Rep. 488; *Marshall* v. *Green*, 1 C. P. D. 35; or fruit: *Rodwell* v. *Phillips*, 9 M. & W. 501.

Future delivery by seller.

2. A contract for the future delivery *by the seller* of a crop, whether *fructus industriales* or not, unripe at the date of the contract, is not within the statute: *Warwick* v. *Bruce*, 2 M. & S. 205; *Evans* v. *Roberts*, 5 B. & C. 829.

Emblements taken by buyer at a future time.

3. A contract that the buyer shall himself take the crop when it is ripe is not within the statute if the crop is *fructus industriales*: *Warwick* v. *Bruce*, 2 M. & S. 205. Thus, in *Jones* v. *Flint* (10 Ad. & E. 753), where corn, potatoes, and lay grass were included in one contract, Lord Denman, C. J., said: "All but the lay grass are *fructus industriales*. As such they are seizable by the sheriff under a fi. fa., and go to the executor, not the heir. If they had been ripe it would have been quite settled that the contract was for the sale of chattels, and although

Chap. I. s. 2.

they had still to derive nutriment from the land, yet a contract for the sale of them has been determined, from this their original character, not to be on that account the sale of an interest in land." See also *Sainsbury* v. *Matthews*, 4 M. & W. 343.

Future crop, not being emblements, taken by buyer.

4. A contract that the buyer shall himself take the organic produce, not being *fructus industriales*, when it is ripe is within the statute, if it appears to have been the intention of the parties that he should have for that purpose the exclusive right to possession of the land, or of the crop growing on the land. See *Warwick* v. *Bruce*, 2 M. & S. 205. Thus it has been held that a contract for the purchase of a standing crop of grass to be mown and made into hay by the purchaser, conferred an exclusive right to the vesture of the land during a limited time, and required to be in writing, as a contract or sale of an interest in or concerning lands: *Crosby* v. *Wadsworth*, 6 East, 602. See also *Teal* v. *Auty*, 2 Bro. & B. 99; *Scorell* v. *Boxall*, 1 Y. & J. 396; *Carrington* v. *Roots*, 2 M. & W. 248; *Rodwell* v. *Phillips*, 9 M. & W. 501; *Jones* v. *Flint*, 10 Ad. & E. 753, a case in which a contract for the "lay grass" was construed to be an agreement for agistment of cattle.

Licence.

Although a contract may be void under the statute, it may be pleaded as a licence in answer to an action of trespass: *Carrington* v. *Roots*, 2 M. & W. 248.

Sale to incoming tenant.

A sale of crops by a landlord (*Earl of Falmouth* v. *Thomas*, 1 Cro. & M. 89) or an outgoing tenant (*Mayfield* v. *Wadsley*, 3 B. & C. 357) to an incoming tenant, when connected with the agreement for the tenancy, as in the former case it generally is, must be evidenced by writing, even when the crops are separately valued. But a sale of the crops by an outgoing tenant, either to the landlord or to the incoming tenant, would seem, if a separate transaction, to be only a release of his right to take the crop.

Fixtures.

Fixtures resemble growing crops in being annexed to the freehold, and in being usually divided into two classes, according as they go to the heir, or the executor. There, however, the resemblance ceases; for fixtures derive no benefit from the soil as growing crops do, and a sale of fixtures to a person not having any interest in the land must necessarily be a sale of

chattels. There is but little authority on the question whether fixtures are an interest in land within the meaning of the Statute of Frauds; but it has been decided that a contract whereby a landlord and tenant agree, before the expiration of the tenancy, that the fixtures shall be taken by the landlord at a fair valuation, is not a sale of an interest in land within the 4th section: *Hallen* v. *Runder*, 1 Cr. M. & R. 266; or of goods and chattels within the 17th section: *Lee* v. *Gaskell*, 1 Q. B. D. 700. See also *Lee* v. *Risdon*, 7 Taunt. 188.

The same principle would seem to apply between an incoming and an outgoing tenant. It is, therefore, conceived that a sale of fixtures by themselves is never within the statute; for if made to the landlord or the intending occupier, it amounts to a release of the right to sever, while, if made to a stranger, whether for immediate or future delivery, and whether the severance is to be effected by the buyer or the seller, the sale is not of any interest in land, but of things which are to acquire the character of chattels at a future time.

The foregoing remarks must not be understood as applying to cases where there is one contract including both land and fixtures, which must of course be in writing. See further, as to assignments of fixtures, Benjamin on Sales of Personalty, 118, 3rd ed.; Amos & Ferard, 328, 3rd ed.; The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4; and the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 34.

Licences.

A licence is distinguished from a lease by its conferring on the licensee no interest in the soil, but merely some personal and inalienable privilege. A licence, not being a lease, is not within sect. 1 of the Statute of Frauds: *Web* v. *Paternoster*, Palm. 71; *Doe* d. *Hanley* v. *Wood*, 2 B. & Ald. 724; and therefore a parol agreement that the plaintiff should, during the term of seven years, have the liberty of stacking coals upon part of a close, and have the sole use of that part of the close, has been held not to be void, but a valid licence for the seven years: *Wood* v. *Lake*, Sayer, 3. This decision has been questioned (see Sug. V. & P. 123; Dart, 199); and the agreement there certainly seems to have been more than a mere licence, and to have amounted to a demise. It is not very important to deter-

Chap. I. s. 2.

Parol licence.

mine whether a mere licence can be granted by parol, for such a licence is revocable at the will of the grantor: *Wood* v. *Leadbitter*, 13 M. & W. 838. This places the licensee in a dilemma, for if the licence is coupled with an interest it must be in writing, and if it is not it is revocable. Mr. Justice Cave rested his argument, as counsel in the case of *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402, upon this dilemma; and it can scarcely be said to have been answered by the Lord Chief Justice in the following remarks:—"The dilemma suggested does not, as I think, arise. The contract did not relate to the possession or enjoyment of the land, or any right over it, but only to the use of it under very stringent regulations, the defendants retaining themselves complete possession of and all rights over it," p. 409. See further, *Taylor* v. *Waters*, 7 Taunt. 374; *Wright* v. *Stavert*, 2 E. & E. 721.

Licensee not a trespasser.

A licensee by parol is not a trespasser until the licence has been revoked, and sufficient notice must be given of the revocation to enable the licensee to discontinue the occupation of the premises: *Cornish* v. *Stubbs*, L. R. 5 C. P. 334; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400.

Licence coupled with an interest.

Where a licence is coupled with an interest (as, for example, a right to search for and take away minerals), it becomes an incorporeal hereditament, is irrevocable, and, by a rule much older than the Statute of Frauds, must be created by deed: *Hewlins* v. *Shippam*, 5 B. & C. 221; *Cocker* v. *Cowper*, 1 Cr. M. & R. 418; *Wood* v. *Leadbitter*, 13 M. & W. 838.

The rule that an incorporeal hereditament must be created by deed is—differing in this respect from the Statute of Frauds—part of the *lex loci* and not of the *lex fori*: *Adams* v. *Clutterbuck*, 10 Q. B. D. 403.

It is conceived that an executory agreement for the grant of a licence coupled with an interest, or of an easement, is within sect. 4 of the Statute of Frauds, as relating to an interest in lands; and that if such an agreement has been entered into for valuable consideration it will be specifically enforced if it is in writing, and signed by the party to be charged, or if being verbal it has been so acted upon as to make it inequitable for the grantor to withdraw: see *Duke of Devonshire* v. *Eglin*, 14

Beav. 530; *Winter* v. *Brockwell*, 8 East, 308; *Frogley* v. *Earl of Lovelace*, John. 333.

A right to kill and take away game.

A right to kill and take away game is a *profit à prendre*, and an agreement for the enjoyment of such a right is a contract for an interest in land, and therefore within sect. 4 of the Statute of Frauds: *Webber* v. *Lee*, 9 Q. B. D. 315; but it seems that a mere right to shoot or hunt, without taking away the game, might be the subject of a parol licence: *Ibid.*

Land held for partnership purposes.

Land bought by a partner for the purposes of the partnership is not, as between the partners, within the Statute of Frauds, and the other members of the firm can establish their claim by parol evidence.

Thus, where one of four partners in a bank took, with three strangers, a lease of a colliery as tenants in common, Lord Rosslyn, L. C., observed, "The question of partnership must be tried as a fact. If it is established that these persons (*i. e.* the members of the banking firm) were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident": *Forster* v. *Hale*, 3 Ves. 696; 5 Ves. 308.

A partnership may also be constituted without writing for the purpose of speculating in land, and either partner may establish his interest in any particular purchase on behalf of the firm without evidence in writing: *Dale* v. *Hamilton*, 5 Hare, 369; 2 Ph. 266.

Partners may, after the expiration of the original term, agree by parol to continue the partnership "on the old terms," and land used for partnership purposes will, under those circumstances, be bound by the provisions of the articles, including a right of pre-emption in favour of one of the partners: *Essex* v. *Essex*, 20 Beav. 442.

The case of *Caddick* v. *Skidmore* (2 De G. & J. 52), seems to conflict with the foregoing decisions; for there it was held that an agreement between the plaintiff and defendant to become partners in a colliery, for the purpose of demising it upon royalties, which were to be divided in some proportion between them, was incapable of being enforced, unless proved by such evidence as is required by the Statute of Frauds. But on this case two points are to be noticed, which may perhaps reconcile

Chap. I. s. 2.

the decision with those already referred to—(1) There was no partnership except in the colliery; and (2) The colliery belonged to the defendant before the alleged agreement for partnership. The agreement to enter into partnership, therefore, was in substance an agreement to become tenants in common of the defendant's land.

Shares in companies.

Shares in a railway company (*Bradley* v. *Holdsworth*, 3 M. & W. 422; *Duncuft* v. *Albrecht*, 12 Sim. 189), in a projected railway company (*Tempest* v. *Kilner*, 3 C. B. 249), in a joint stock banking company (*Humble* v. *Mitchell*, 11 Ad. & E. 205), or in a waterworks company (*Bligh* v. *Brent*, 2 Y. & C. Ex. 268), are neither interests in land within sect. 4, nor goods, wares or merchandizes within sect. 17 of the Statute of Frauds.

Shares in a mine worked on the cost-book principle do not constitute an interest in land within sect. 4, in the absence of evidence that the shareholders take a direct interest in the freehold: *Watson* v. *Spratley*, 10 Exch. 222; *Powell* v. *Jessopp*, 18 C. B. 336.

In *Boyce* v. *Greene* (Batty, 608), it was held that a share in a mining company incorporated by Act of Parliament was an interest in land, on the ground that a purchaser acquired a share in the lands of the company. Even if rightly decided, which has been doubted (see Lindley, p. 674), this case would govern very few at the present day. See further, *Morris* v. *Glynn*, 27 Beav. 218; disapproved in *Entwistle* v. *Davis*, L. R. 4 Eq. 272. The proper test is conceived to be, "What is the nature of the interest taken by each shareholder?" If he is a tenant in common of the property of the company the share is within the statute; if he has only a money interest in the concern, the share is personal estate, and may be sold by parol. See *Toppin* v. *Lomas*, 16 C. B. 145.

In *Myers* v. *Perigal* (2 De G. M. & G. 599), shares in a joint stock bank, whose assets comprised land and mortgages, were held not to be within the Statute of Mortmain; and Lord St. Leonards in his judgment proposed the following test, which seems to be equally applicable to cases under the Statute of Frauds: "The true way to test it would be to assume that there is real estate of the company vested in the proper persons under

the provisions of the partnership deed. Could any of the partners enter upon the lands, or claim any portion of the real estate for his private purposes? They would have no right to step upon the land; their whole interest in the property of the company is with reference to the shares bought, which represent their proportions of the profits," p. 620. See also *Hayter* v. *Tucker*, 4 K. & J. 243; *Edwards* v. *Hall*, 6 De G. M. & G. 74; *Attree* v. *Hawe*, 9 Ch. D. 337.

Rent.

Where a loan has been contracted, an agreement to repay it out of future rent is within sect. 4 of the Statute of Frauds, and a direction in writing to the tenant to pay the rent to the lender when it accrues due is a revocable authority which is revoked by the bankruptcy of the borrower: *Ex parte Hall*, 10 Ch. D. 615. Arrears of rent, however, are personalty, and are not within the Statute of Mortmain, or, *à fortiori*, within the Statute of Frauds: *Edwards* v. *Hall*, 6 De G. M. & G. 74; *Thomas* v. *Howell*, L. R. 18 Eq. 198.

A parol contract to pay during the residue of a term a percentage of the cost of improvements executed by the lessor, is not a demise of the new buildings at a rent, and may accordingly be enforced: *Hoby* v. *Roebuck*, 7 Taunt. 157; and this holds even if the additional sum is treated as an increase of the rent: *Donellan* v. *Read*, 3 B. & Ad. 899. An agreement, however, for the abatement of rent is within the statute: *O'Connor* v. *Spaight*, 1 Sch. & Lef. 305.

Sect. 3.—*Collateral Agreements.*

Land and personalty.

If an agreement is void as to land on account of not satisfying the requirements of the statute, it must be void also as to personal property sold with it. When it is one entire contract the whole must stand or fall together: *Cooke* v. *Tombs*, 2 Anst. 420.

Distinct contracts.

But where there are distinct contracts, and separate prices are fixed, that relating to chattels may be separately enforced: *Mayfield* v. *Wadsley*, 3 B. & C. 357.

Executed parol contract

After a parol contract concerning an interest in land has been

Chap. I. s. 3.

executed, an action will lie upon a separate promise which was to have been performed after such execution. Thus, on a sale of premises, it was agreed that 10*l.*, part of the purchase-money, should be returned, if the purchaser should be refused a licence to use the premises as a slaughter-house, and the purchaser, after being refused the requisite licence, was held entitled to recover the 10*l.*: *Green* v. *Saddington*, 7 El. & B. 503. See also *Griffith* v. *Young*, 12 East, 513; *Poulter* v. *Killingbeck*, 1 Bos. & P. 397; *Seaman* v. *Price*, 2 Bing. 437.

will support a separate promise.

Where the acceptance of a lease, or the entering into any contract relating to land, is itself the consideration for a parol contract relating to chattels, the latter may be enforced, notwithstanding its intimate connection with the contract relating to land.

Contract relating to land the consideration for another contract.

Thus, if a lessee signs a lease on the faith of a parol agreement by the landlord to destroy rabbits (*Morgan* v. *Griffith*, L. R. 6 Ex. 70; *Erskine* v. *Adeane*, L. R. 8 Ch. 756), or to execute repairs (*Angell* v. *Duke*, L. R. 10 Q. B. 174, overruling *Mechelen* v. *Wallace*, 7 Ad. & E. 49, and disapproving *Cocking* v. *Ward*, 1 C. B. 858), he will have a right of action against the landlord if the promise should not be fulfilled.

"No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement: but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease, or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself."—Per Mellish, L. J.: *Erskine* v. *Adeane*, L. R. 8 Ch. 766.

Collateral agreement not a variation.

Pending negotiations for a lease of a dwelling-house, it was agreed between the parties that the plaintiff (the intending lessee) should pay 75*l.* towards certain alterations in the premises. Instead of doing this, however, he, with the defendant's consent, executed part of the alterations himself. He was subsequently, through the default of the defendant, prevented from taking possession, and the negotiations accordingly fell through.

Execution of repairs by lessee.

It was held, questioning the case of *Hodgson* v. *Johnson* (E. B. & E. 685), that the plaintiff was entitled to recover the value of the work done by him: *Pulbrook* v. *Lawes*, 1 Q. B. D. 284.

Separable contract.

Where an option is given to the lessee to take an extension of his lease, the contract may be divided into two parts, an actual demise and an agreement for extension, so as to avoid the operation of the statute 8 & 9 Vict. c. 106, requiring a lease for more than three years to be under seal: *Hand* v. *Hall*, 2 Ex. D. 355. In this case, Lord Cairns said: "I think the agreement is an actual demise, with a stipulation superadded, that if at his option the tenant gives the landlord a notice of his intention to remain, he shall have a renewal of his tenancy for three years and a half."

Sect. 4.—*Signature of the Agreement.*

What is a sufficient signature.

The fourth section of the Statute of Frauds requires the agreement or some memorandum thereof to be signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. Signature by the defendant is thus made sufficient; and, notwithstanding the absence of mutuality, the Court will not refuse to decree specific performance, upon the ground that the agreement was not signed by the plaintiff: *Western* v. *Russell*, 3 V. & B. 187; *Ormond* v. *Anderson*, 2 Ball & B. 363; and see *Egerton* v. *Mathews*, 6 East, 307; *Allen* v. *Bennet*, 3 Taunt. 169; *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; cases which finally removed the doubts suggested by *Lawrenson* v. *Butler*, 1 Sch. & Lef. 13; *Martin* v. *Mitchell*, 2 J. & W. 413, 428, as to the validity of an agreement signed by one party only.

Signature is to authenticate the agreement.

The signature is to have the effect of giving authenticity to the whole instrument, and if the name is inserted so as to have that effect, it does not signify much in what part of the instrument it is to be found; it is perhaps difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect: Per Eyre, B. *Stokes* v. *Moore*, 1 Cox, 219, 223. It has been

Chap. I. s. 4.

observed by Lord Westbury that the phrases "authentic" and "authenticity" are not quite felicitous, but that their meaning is plainly this, that the signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument: *Caton* v. *Caton*, L. R. 2 H. L. 127, 143.

Entry in minute book.

Where an entry was made in the minute book of a company, in which reference was made to a draft agreement, parol evidence was admitted to connect the approved draft with the entry; and the signature of the chairman at the next meeting was held to be sufficient to satisfy the requirements of the statute: *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314. Lush, J., in delivering the judgment of the Court, said:—"The signature required by the 4th section is not of the substance of the contract; it is matter of procedure only (*Leroux* v. *Brown*, 12 C. B. 801), and is required as evidence of the contract. To prevent frauds and perjuries, the Act will not allow any other kind of proof than the writing itself (if it be in writing), or a written admission that the contract was made, and that it was signed in either case by the party to be charged. But so that this kind of evidence is given, it matters not that the memorandum was not made at the time, or for what purpose the signature was put, if only it was put to attest the document as that which contains the terms of the contract."

Intention of the person signing.

The intention of the person signing need only be to authenticate the instrument, and not to bind himself by the agreement; and, accordingly, if a person, knowing the contents of an instrument, signs his name as witness, it will satisfy the statute: *Welford* v. *Beazely*, 3 Atk. 503. Lord Eldon, referring to this decision, said:—"Lord Hardwicke has already decided, that where either the party himself, or a person duly authorized by him, ascertains the agreement by a signature, not in the body of the instrument, which I represent to be doubtful, but in the form of addition, that signature of that instrument ascertains the agreement sufficiently within the statute: though not a signing as an agreement, yet sufficient to identify the agreement": *Coles* v. *Trecothick*, 9 Ves. 234, 253.

In this case the confidential clerk of Smith, the auctioneer,

signed a contract in the following form:—'Witness, Evan Phillips, for Mr. Smith, agent for the seller,' Lord Eldon said, "It is true that where a party, or principal, or person to be bound signs as—what he cannot be—a witness, he cannot be understood to sign otherwise than as a principal." That is to say, the mere fact of describing himself as a witness will not prevent his being liable as a principal.

Signature explained by evidence.

The question whether a document was signed by a particular person, and, if so, the purpose for which he signed it are matters of evidence; and if there is any ambiguity in the form of signature, parol evidence of contemporaneous statements is admissible to remove the ambiguity: *Young* v. *Schuler*, 11 Q. B. D. 651.

Signature as witness.

A distinction must, it is conceived, be drawn between a signature as witness to the instrument, and as witness to the signature of another person. No case can be cited in which a signature in the latter capacity has been held to bind the signatory as a contracting party. In *Welford* v. *Beazely* (3 Atk. 503) a mother, on the marriage of her daughter, signed as a witness marriage articles which purported to settle a sum of money agreed to be paid by her as a portion. She was not named as a party, but was held bound, apparently because she authenticated the articles by her signature. Lord Hardwicke's judgment rests on the mother's knowledge of the contents of the articles, and he seems to have considered that the attestation of the instrument raised no presumption of knowledge as to its contents. See report in 1 Ves. sen. 6. In *Coles* v. *Trecothick* (9 Ves. 234), the signature relied on was clearly a signature by an authorized agent, and not the attestation of another signature. In *Gosbell* v. *Archer* (2 Ad. & E. 500), the auctioneer's clerk merely witnessed the signature of the purchaser, and this was held not to be sufficient to satisfy the Statute of Frauds so as to bind the vendor.

Documents physically unconnected.

In a recent case, a document, which was headed "Supplement," commenced, "I had quite omitted to tell you," and was enclosed in the same envelope with a signed letter; but was written on a separate sheet of paper, and was not signed in any

Chap. I. s. 4.

manner, it was held to be invalid as a declaration of trust: *Kronheim* v. *Johnson*, 7 Ch. D. 60.

Signature by agents.

An agent for the sale or purchase of land may be appointed by parol; but it is in general desirable that his authority should be given by writing: see *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Heard* v. *Pilley*, L. R. 4 Ch. 548; *Cave* v. *Mackenzie*, 46 L. J. Ch. 564. And the question, whether he had authority to bind his principal is one of fact for the jury: *Ridgway* v. *Wharton*, 6 H. L. C. 238, at pp. 260, 271.

The first and third sections of the Statute of Frauds, which relate to the granting of leases, require agents who sign on behalf of their principals to be appointed by writing; but the fourth and seventeenth sections are satisfied by a parol appointment.

There is some difference in the language used in the fourth and seventeenth sections, the fourth speaking of a signature "by the party to be charged therewith, or some other person thereunto by him lawfully authorized;" while the seventeenth adopts the form, "by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The adoption of the plural instead of the singular number has not, however, affected the interpretation of the section; and, it seems, that so far as the signature by agents is concerned, there is no difference between the two sections. The authorities, therefore, on the seventeenth are equally authorities on the fourth section; and *vice versâ*.

Coles v. *Trecothick.*

In *Coles* v. *Trecothick* (9 Ves. 234), a contract written on the particulars of sale was signed by Phillips, a confidential clerk of Smith, the auctioneer, in the following form:—"Witness, Evan Phillips, for Mr. Smith, agent for the seller." The Lord Chancellor came to the conclusion on the evidence that Phillips was "lawfully authorized" by the vendor to sign the contract (see p. 243), so that the case is not an authority for the proposition that auctioneers' clerks have, in general, an implied authority to sign the name of the vendor. The words, "agent for the seller," seem to have been taken as part of the description of Mr. Smith, and not as describing the character in which Phillips signed. See also *Blore* v. *Sutton*, 3 Mer. 237.

One of the parties cannot be the agent of the other for the purpose of signing the contract: *Sharman* v. *Brandt*, L. R. 6 Q. B. 720.

Directors.

The chairman of directors, by signing the minutes, may bind the company, even though his signature be affixed *alio intuitu—i. e.*, for the verification of the proceedings in obedience to the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67: *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314.

Position of signature.

The part of the instrument in which the name appears is immaterial, provided the intention was to authenticate the whole agreement. Thus, a letter in the third person commencing with the name of the writer (*Ogilvie* v. *Foljambe*, 3 Mer. 53), or an agreement in the handwriting of the party to be charged in the form, "I, A. B., agree with C. D., &c." (*Hubert* v. *Treherne*, 3 M. & Gr. 743), or "Mr. W. P. has agreed, &c." (*Propert* v. *Parker*, 1 R. & My. 625), are sufficiently signed without a subscription of the name. See also *Morison* v. *Turnour*, 18 Ves. 175; *Bleakley* v. *Smith*, 11 Sim. 150. But a formal agreement commencing with the names of the contracting parties, and concluding with the words "as witness our hands," without being followed by any name or signature, is not duly signed: *Hubert* v. *Treherne*, 3 M. & Gr. 743. The mere circumstance of the name of the party being written by himself in the body of a memorandum of agreement will not constitute a signature within the meaning of the statute: *Stokes* v. *Moore*, 1 Cox, 219; *Caton* v. *Caton*, L. R. 2 H. L. 127.

Form of signature.

The surname without the christian name is a sufficient signature: *Propert* v. *Parker*, 1 R. & My. 625. It has been assumed in several cases that initials constitute a signature within the meaning of the statute: see *Jacob* v. *Kirk*, 2 Moo. & R. 221; *Sweet* v. *Lee*, 3 M. & Gr. 452; *Kronheim* v. *Johnson*, 7 Ch. D. 60. But if placed in the margin opposite an interlineation, they will not authenticate the entire instrument: see *In the goods of Christian*, 2 Rob. 110; *In the goods of Blewitt*, 5 P. D. 116. There must be some name, letter, or mark affixed to the instrument with the intention of authenticating it. Thus, the mere alteration of a draft by a defendant in his own handwriting is not a signature: *Hawkins* v. *Holmes*, 1 P. Wms. 770.

Chap. I. s. 4.

Pencil.

The signature, and even the whole agreement, may be written in pencil, as well as in ink: *Geary* v. *Physic*, 5 B. & C. 234. But when a question arises whether a memorandum constitutes a concluded agreement or not, the circumstance of the signature being in pencil may favour the supposition that the signature was deliberative: *Lucas* v. *James*, 7 Hare, 410, 419.

Printed name.

If a man is in the habit of stamping or printing his name instead of writing it, he may, it seems, sign in that manner as well as by his written name: *Saunderson* v. *Jackson*, 2 Bos. & P. 238. But this case depends for its authority more upon the subsequent recognition than upon the printed names: per Tindal, C. J., *Hubert* v. *Treherne*, 3 M. & Gr. 743, 754.

The name of the seller printed at the head of a bill of parcels is not of itself a signature; but the contents of the document may show an appropriation of the printed name to the particular contract, in which case it will be a valid signature: *Schneider* v. *Norris*, 2 M. & S. 286.

Telegram.

It would seem that when an offer by letter is accepted by telegram, the signature to the instructions for the telegram operates as a signature to the contract: *Godwin* v. *Francis*, L. R. 5 C. P. 295.

Sect. 5.—*What is a sufficient Memorandum or Note.*

Memorandum or note.

The 4th section of the Statute of Frauds does not require the agreement itself, but merely some memorandum or note thereof, to be in writing. But whether it be in form an agreement, or only a memorandum or note of an already concluded agreement, the written document must contain all the material terms of the contract: *Owen* v. *Thomas*, 3 My. & K. 353.

There may be a memorandum or note of a contract sufficient to satisfy the statute, which when written was not intended to operate as a contract: *Forster* v. *Rowland*, 7 H. & N. 103.

A request to be let off the purchase may serve to bind the purchaser. Thus an indorsement on a draft lease in the following terms was held to be a sufficient memorandum:—"I hereby request Mr. S. (the plaintiff) to endeavour to let the premises to some other person, as it will be inconvenient to me to perform

my agreement for them, and for so doing this shall be a sufficient authority. J. Derrison": *Shippey* v *Derrison*, 5 Esp. 190.

Receipt.

A receipt for part of the purchase-money and a subsequent letter may together constitute a sufficient memorandum: *Studds* v. *Watson*, 28 Ch. D. 305. See *Dyas* v. *Stafford*, 9 L. R. Ir. 520.

Abandonment of contract.

A letter written by the solicitors of one party to those of the other, recommending the purchaser "to relinquish his purchase," offering to pay costs, and asking for a return of the abstract, is an abandonment, not a ratification of a previous contract which had not been signed by the vendor: *Gosbell* v. *Archer*, 2 Ad. & El. 500.

A contract by an agent "subject to the approval" of the vendor is not a sufficient note or memorandum to satisfy the statute: *Dyas* v. *Stafford*, 9 L. R. Ir. 520.

Letter.

A letter which contained an admission of the bargain, and of all the substantial terms of it, was held to be a sufficient note or memorandum of the contract to satisfy the 17th section, notwithstanding that the writer by the letter repudiated his liability: *Bailey* v. *Sweeting*, 9 C. B. N. S. 843. See also *Cooper* v. *Smith*, 15 East, 103; *Richards* v. *Porter*, 6 B. & C. 437. The terms, however, of the 17th section are not in this respect as comprehensive as those of the 4th section: *Gibson* v. *Holland*, L. R. 1 C. P. 1.

The requirements of the statute would seem to be satisfied by a letter from the party to be charged to his solicitor (*Rose* v. *Cunynghame*, 11 Ves. 550; *Owen* v. *Thomas*, 3 My. & K. 353; see *Goodwin* v. *Fielding*, 4 De G. M. & G. 90), or to his agent (*Gibson* v. *Holland*, L. R. 1 C. P. 1), or by a memorandum not addressed to any person in particular (*Goodwin* v. *Fielding*, 4 De G. M. & G. 90, 101); but not by instructions for the preparation of a conveyance in the handwriting of the defendant, and signed by him: *Cooke* v. *Tombs*, 2 Anst. 420. See *Caton* v. *Caton*, L. R. 2 H. L. 127, 140.

Approval of draft.

A draft endorsed with the words "We approve of the within draft," followed by the signatures of the parties, has been held at *nisi prius* not to be an agreement or memorandum so as to

Chap. I. s. 5.

require a stamp: *Doe* d. *Lambourn* v. *Pedgriph*, 4 Car. & P. 312. But a draft conveyance which recites the agreement for purchase, and is signed by the parties, may be a sufficient memorandum of contract. "It is a question," says Lord St. Leonards, "to be decided in each case, whether they signed in that form as simply approving of the draft as such, or whether they intended to give validity to it as an agreement:" Sug. V. & P. 144. The recognition, however, in this manner of an existing parol contract, would seem to be sufficient without any intention of signing the draft as an agreement. See *Saunderson* v. *Jackson*, 2 Bos. & P. 238. The approval of a draft by one of the parties is very different from an approval by his solicitor. When a non-professional person writes the word "approved" upon a draft, his meaning would in general be that he approved of the terms of the agreement, and not merely of the legal form and expression of the instrument: *Brogden* v. *Met. Ry. Co.*, 2 App. Cas. 666, 675.

But where the approval of a draft is given by a solicitor, and not by the party himself, it is more difficult to establish a contract on this basis. For the solicitor is *primâ facie* the agent of his client only for the purpose of reducing the agreement into proper form, and not for the purpose of binding him by his signature: *Smith* v. *Webster*, 3 Ch. D. 49. The unqualified acceptance, however, of a signed draft, if communicated without unreasonable delay to the opposite party, may, it seems, constitute a binding agreement: *Thornbury* v. *Bevill*, 1 Y. & C. C. 554; and see *Brogden* v. *Met. Ry. Co.*, 2 App. Cas. 666.

A letter from the defendant's to the plaintiff's solicitor in these terms:—"W. has been with us to-day, and stated that he had arranged with your client, A., for the sale to the latter of the *Golden Lion* for 950*l*. We therefore send herewith draft contract for your perusal and approval"—is not such a note or memorandum of an agreement as is required by the Statute of Frauds; for the authority to the solicitor was not to write a letter which should contain the terms of the contract, but merely to prepare a formal draft contract to be sent to the other side for perusal and approval. When perused and approved, the contract was intended to be signed by the parties themselves: *Smith* v. *Webster*, 3 Ch. D. 49.

Sect. 6.—*Exceptions from the Statute.*

Remedies on parol agreements.

A parol contract relating to land, in which some of the connected provisions do not relate to land, is not for all purposes invalidated by the Statute of Frauds; and where it has been executed so far as regards the land, a party may in some cases maintain an action for a breach of the other provisions: *Price* v. *Leyburn*, Gow, N. P. Cas. 109; *Green* v. *Saddington*, 7 El. & B. 503.

Money had and received.

Where a lessee agrees to pay to the lessor, as the price of his consent to an assignment of the lease, part of the consideration received from the assignee, the lessor can, after the money has been paid to the lessee, maintain an action against him for money had and received to his use: *Griffith* v. *Young*, 12 East, 513.

Promise to pay.

The parol contract, although not capable of being enforced, is, after being executed, a sufficient consideration to support a promise to pay. This was the ground of decision in *Seaman* v. *Price*, 2 Bing. 437, where the plaintiff, having orally contracted for the purchase of some houses, sold the bargain to the defendant for 40*l*. The defendant having obtained a conveyance of the houses, the plaintiff was held entitled to recover the 40*l*.

Account stated.

If, after the execution of the contract, so far as it relates to land, the defendant admits a debt to be due by him to the plaintiff, this seems to be sufficient to support an action upon an "account stated:" *Knowles* v. *Michel*, 13 East, 249; *Pinchon* v. *Chilcott*, 3 Car. & P. 236; *Cocking* v. *Ward*, 1 C. B. 858. See, however, *Smart* v. *Harding*, 15 C. B. 652.

The foregoing cases were decided at a time when the forms of pleadings were of more importance than they are now; but they serve to indicate what subsequent recognition of a parol contract will enable the plaintiff to recover. It is not in every case that an action will lie upon an executed contract: per Bramwell, B., *Sanderson* v. *Graves*, L. R. 10 Ex. 234, 238, disapproving the dictum of Tindal, C. J., in *Souch* v. *Strawbridge*, 2 C. B. 808, 814.

When action lies on an executed contract.

There must, it seems, be either an implied or express renewal of the promise, or an account stated between the parties,

Chap. I. s. 6.

or the acknowledgment of an existing debt. In *Sanderson* v. *Graves*, *supra*, there was an agreement in writing to grant a lease on certain terms, and that if the lessee sold the lease for more than 1,200*l.*, which he did, he would divide the difference with the plaintiff. The lease was subsequently granted, but its terms were so different from those of the written agreement that the Court came to the conclusion that it had been granted under a substituted agreement. The jury, however, found that the stipulation as to dividing the surplus purchase-money remained in force or had been renewed; notwithstanding this, the Court held that the lessor could not recover the moiety of the surplus purchase-money received by the lessee, but that the contract should have been in writing so as to satisfy the Statute of Frauds.

Excepted cases.

There are certain cases which the Courts of equity have withdrawn from the operation of the Statute of Frauds, "in contradiction to the positive enactment of the statute, though these proceedings are in words included in it:" *Bond* v. *Hopkins*, 1 Sch. & Lef. 413, 434.

Fraud

The most important exception is furnished by the case of fraud, for "the principle of the Court is that the Statute of Frauds was not made to cover fraud:" per Turner, L. J., *Lincoln* v. *Wright*, 4 De G. & J. 16, 22; and see *Davies* v. *Otty*, 35 Beav. 208.

"The Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties": per Lord Selborne, L. C., *Jervis* v. *Berridge*, L. R. 8 Ch. 351, 360. This observation was accepted and approved by the House of Lords in the case of *Hussey* v. *Horne Payne*, 4 App. Cas. 311.

On the ground of fraud, it has been decided that where the real agreement was for a mortgage but a conveyance was taken absolute in form, the defendant could not insist upon his conveyance in fraud of the agreement: *Lincoln* v. *Wright*, 4 De G. & J. 16. So, also, a parol agreement for a re-conveyance if the plaintiff should not be convicted of bigamy was enforced, although the defendant denied the agreement, and set up the

statute: *Davies* v. *Otty*, 35 Beav. 208; and see *Haigh* v. *Kaye*, L. R. 7 Ch. 469.

Where an assignment of leasehold premises was made on the express understanding that the defendant was to hold part of them as trustee for the plaintiff, the defendant was not allowed afterwards to repudiate his parol agreement, and claim the possession of the whole: *Booth* v. *Turle*, L. R. 16 Eq. 182.

In *Chattock* v. *Muller* (8 Ch. D. 177), the defendant lulled the plaintiff into not making an offer for an estate, by a parol representation that if he was allowed to buy it himself the plaintiff should have the part which he wanted. He was held to have purchased part as agent of the plaintiff, and an inquiry was directed as to what part the plaintiff was entitled to, and the price which he was to pay for it.

Part performance.

Closely connected with the subject of fraud is the doctrine of "part performance."

Principle on which it rests.

"It was against conscience to suffer the party who had entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out. At law fraud destroys rights:" per Lord Redesdale, *Bond* v. *Hopkins*, 1 Sch. & Lef. 413, 433; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22, 41; but according to Cotton, L. J., the true ground of the doctrine is not fraud, but "that if the Court found a man in occupation of land, or doing such acts with regard to it as would *primâ facie* make him liable at law to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a contract existed": *Britain* v. *Rossiter*, 11 Q. B. D. 123, 131; *Maddison* v. *Alderson*, 8 App. Cas. 467, 474.

Possession.

Possession delivered according to the agreement is an act of part performance which takes a parol agreement out of the statute: *Butcher* v. *Stapely*, 1 Vern. 363; *Earl of Aylesford's Case*, 2 Str. 783; *Bowers* v. *Cator*, 4 Ves. 91; *Dale* v. *Hamilton*, 5 Hare, 369, 381, affirmed 2 Ph. 266; *Pain* v. *Coombs*, 1 De G. & J. 34.

Expenditure.

And the case is strengthened where the purchaser, besides entering into possession, expends money on the faith of the agreement: *Lester* v. *Foxcroft*, Colles, P. C. 108; *Wills* v.

Chap. I. s. 6.

Stradling, 3 Ves. 378; *Toole* v. *Medlicott*, 1 B. & Beat. 393; *Sutherland* v. *Briggs*, 1 Hare, 26; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, 170.

Acts must be referrible to agreement.

The Acts relied on as a part performance must be such, according to Lord Hardwicke, "as could be done with no other view or design than to perform the agreement" (*Gunter* v. *Halsey*, Amb. 586); or, according to Sir T. Plumer, as are "unequivocally referrible to the agreement:" *Morphett* v. *Jones*, 1 Sw. 172, 181. See also *Cooth* v. *Jackson*, 6 Ves. 12, 38; *Kine* v. *Balfe*, 2 B. & Beat. 343.

Wrongful possession.

Thus, possession obtained wrongfully is not a part performance: *Cole* v. *White*, cited 1 Bro. C. C. 409; nor is the mere holding over by the tenant: *Wills* v. *Stradling*, 3 Ves. 378, 381; but it may be referred to a contract for a renewed lease: *Dowell* v. *Dew*, 1 Y. & C. C. 345, 356.

Possession of tenant ambiguous.

Possession as tenant, during an existing tenancy, is of course no part performance of a contract of sale: *Frame* v. *Dawson*, 14 Ves. 386; *Savage* v. *Carroll*, 1 B. & Beat. 265, 282; *Brennan* v. *Bolton*, 2 Dru. & War. 349.

Between landlord and tenant, observes Sir T. Plumer, where the tenant is in possession at the date of the agreement, and only continues in possession, in many cases that continuance amounts to nothing; but admission into possession having unequivocal reference to the contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into its terms: *Morphett* v. *Jones*, 1 Sw. 172, 181.

Possession taken before contract.

Possession taken in the course of negotiations, which afterwards ripen into a contract, may, it seems, if continued after the contract, be a part performance thereof: *Meynell* v. *Surtees*, 3 Sm. & G. 101, 115; *Pain* v. *Coombs*, 1 De G. & J. 34.

Without authority.

Where possession is taken by the purchaser without authority from the vendor, yet if the latter permits the possession to continue for any length of time (*Gregory* v. *Mighell*, 18 Ves. 328), or if repairs are executed by the purchaser (*Shillibeer* v. *Jarvis*,

8 De G. M. & G. 79, 87) in pursuance of the agreement, it will amount to a part performance.

Expenditure by lessee of purchaser.

Expenditure by a person, to whom the purchaser has agreed to let the property, will take the case out of the statute: *Williams* v. *Evans*, L. R. 19 Eq. 547.

Possession, use or tenure of land.

The acts of part performance, exemplified in the long series of decided cases, in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use or tenure of the land: per Earl of Selborne, L. C., *Maddison* v. *Alderson*, 8 App. 467, 480.

Payment of purchase-money.

In the same case he lays it down (p. 478), in accordance with this principle, that "it may be taken as settled that part payment of the purchase-money is not enough; and judges of high authority have said the same even of payment in full: *Clinan* v. *Cooke*, 1 Sch. & Lef. 40; *Hughes* v. *Morris*, 2 De G. M. & G. 356; *Britain* v. *Rossiter*, 11 Q. B. D. 123. Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself) until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen." See also Sug. V. & P. 152.

Increased rent evidence of new tenancy.

Rent, as an incident of tenure, must, it is conceived, be distinguished from the consideration money on a sale. Thus, a landlord verbally agreed to grant a renewed lease to his tenant at an increased rent, but died before the execution of the lease. Before his death, however, he had received one quarter's rent at the increased rate, and gave the tenant a receipt, in which the sum was specified to have been received for "rent." It was held to amount to a part performance of the agreement for a renewed lease: *Nunn* v. *Fabian*, L. R. 1 Ch. 35. And see the observations on this case in *Humphreys* v. *Green*, 10 Q. B. D. 148.

Introductory or ancillary acts.

Acts merely introductory or ancillary to an agreement cannot be considered as a part performance, although attended with expense. Therefore delivering an abstract, giving directions for conveyances, going to view the estate, fixing upon an appraiser

Chap. I. s. 6.

to value stock, making valuations, &c., will not take a parol agreement out of the statute: Sug. V. & P. 151; Fry, Sp. Perf. 269. So, doing an act which is a condition precedent to a contract is not a part performance: *O'Reilly* v. *Thompson*, 2 Cox, 271, explained 8 App. Cas. 480.

Terms of contract must be proved.

Acts of part performance, in order to take a case out of the statute, must raise a presumption of some contract; and, if they do, parol evidence is admissible to prove the terms. But the doctrine of part performance does not supersede the necessity of showing that there was in fact a concluded parol contract. Thus it was said in an early case by Lord Hardwicke, that "in all those cases where the ground of the decree has been part performance, the terms of the agreement must be certainly proved": *Gunter* v. *Halsey*, Amb. 586. But the Court will struggle, when the plaintiff has failed to establish the precise terms of the agreement, to collect, if it can, what the terms really were: *Mundy* v. *Jolliffe*, 5 My. & Cr. 167, 177. See *Boardman* v. *Mostyn*, 6 Ves. 467, 471; *Savage* v. *Carroll*, 1 B. & Beat. 548, 551; *Oxford* v. *Provand*, L. R. 2 P. C. 135.

A plaintiff, who has established an act of part performance sufficient to take the case out of the statute, may prove the terms either by verbal or documentary evidence, or partly in one way and partly in the other: *Shillibeer* v. *Jarvis*, 8 De G. M. & G. 79; *Pain* v. *Coombs*, 1 De G. & J. 34. Or he may by parol prove some terms in addition to those contained in a document signed by the party to be charged: *Sutherland* v. *Briggs*, 1 Hare, 26, 35.

Remainderman, when bound.

A parol contract in pursuance of a power does not bind the remainderman, although it is in part performed by the intended appointee: Sug. on Powers, 554. See *Blore* v. *Sutton*, 3 Mer. 237. The remainderman may, however, become bound by acquiescence: *Stiles* v. *Cowper*, 3 Atk. 692; *Dowell* v. *Dew*, 1 Y. & C. C. 345.

Corporations.

The doctrine of part performance applies to contracts by corporations: *Wilson* v. *West Hartlepool Ry. Co.*, 2 De G. J. & S. 475. See also *Crook* v. *Corp. of Seaford*, L. R. 6 Ch. 551; *Mayor of Kidderminster* v. *Hardwick*, L. R. 9 Ex. 13; *Melbourne*

Banking Corp. v. *Brougham*, 4 App. Cas. 156, 169; *Att.-Gen.* v. *Gaskill*, 22 Ch. D. 537.

Equitable mortgage by deposit of title deeds.

A mere deposit of title deeds, without any memorandum in writing, constitutes a valid equitable mortgage: *Russel* v. *Russel*, 1 Bro. C C. 269; on the ground that the adverse possession of the title deeds is evidence of an agreement for a mortgage: *Ex parte Wright*, 19 Ves. 255. See also *Ex parte Coming*, 9 Ves. 115; *Ex parte Wetherell*, 11 Ves. 398. The doctrine is a repeal *pro tanto* of the Statute of Frauds and has been condemned; but it is firmly established. See *Norris* v. *Wilkinson*, 12 Ves. 192; *Ex parte Mountfort*, 14 Ves. 606.

Vendor's lien for unpaid purchase-money.

When the purchaser is allowed to take possession of the property, the vendor, in the absence of stipulation, has a lien on the estate for any purchase-money remaining unpaid, and this although the conveyance has been executed, and a receipt indorsed and signed: *Blackburn* v. *Gregson*, 1 Bro. C. C. 420; *Mackreth* v. *Symmons*, 15 Ves. 329. This interest in land, arising by what has been termed "a natural equity" (*Chapman* v. *Tanner*, 1 Vern. 267), requires no written evidence to support it, and is even upheld in contradiction to the express terms of the receipt. It thus furnishes an exception to the general rule laid down by the Statute of Frauds.

Purchaser's lien for prematurely paid purchase-money.

So, also, the purchaser who pays his money before obtaining a conveyance has a lien on the estate in the hands of the vendor, even though he may have taken a security for his money: *Wythes* v. *Lee*, 3 Drew. 396.

Sect. 7.—*Defence of the Statute, how raised.*

Defence of the statute, how raised.

The Statute of Frauds must be pleaded, because it never can be predicted beforehand that a defendant, who may shelter himself under the Statute of Frauds, desires to do so. He may, if it be a question of an agreement, confess the agreement, and then the Statute of Frauds will be inapplicable: Per Lord Cairns, *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51, 58.

The defence of the Statute of Frauds could formerly have been raised by demurrer: *Wood* v. *Midgley*, 5 De G. M. &. G.

Chap. I. s. 7.

41; *Heys* v. *Astley*, 4 De G. J. & S. 34; *secus*, since the Judicature Act, *Catling* v. *King*, 5 Ch. D. 660; *Morgan* v. *Worthington*, 38 L. T. 443; and by the Rules of the Supreme Court, 1883, the defence of this statute must be expressly raised. Ord. XIX. r. 15. It is also provided by these rules that when a contract, promise or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise or agreement, whether with reference to the Statute of Frauds or otherwise. Ord. XIX. r. 20. A defendant, therefore, intending to rely upon the statute should expressly claim the benefit of it by his defence, and state such facts as may be necessary to bring his case within its protection: *Clark* v. *Callow*, 46 L. J. Q. B. 53; *Pullen* v. *Snelus*, 27 W. R. 534. See also *Morgan* v. *Worthington*, 38 L. T. 443.

Admissions.

If a defendant by his pleading admits the agreement the case is taken out of the statute, and of the evil intended to be prevented thereby: *Att.-Gen.* v. *Day*, 1 Ves. sen. 218, 221. And after a great conflict of opinion it is decided that the statute may be used as a bar to the relief, although the agreement be admitted: Sug. V. & P. 140. See *Ridgway* v. *Wharton*, 3 De G. M. & G. 677, affirmed D. P. 6 H. L. Cas. 238.

CHAPTER II.

THE AGREEMENT.

SECT.		PAGE
1.	*Sales, leases and mortgages*	31
2.	*Form of the agreement*	32
3.	*The names of the parties*	33
	i. *What is a sufficient description*	34
	ii. *What is an insufficient description*	35
4.	*The description of the property*	37
	i. *Imperfect on the face of the agreement*	37
	ii. *Defective through extrinsic circumstances*	38
5.	*The price*	38
	i. *Valuation and arbitration*	38
	ii. *Fixtures, &c. at a valuation*	42
	iii. *Duties of valuers and arbitrators*	44
	iv. *Award, when set aside*	45
6.	*Contracts for leases*	46
7.	*Rights of pre-emption*	47
	i. *In wills*	47
	ii. *In leases*	48
	iii. *In partnership articles*	52
	iv. *On sales*	52
	v. *Under the Lands Clauses Act*	53
8.	*Offer and acceptance*	54
9.	*Contract by letters*	57
10.	*Reference to a formal agreement*	60
11.	*Incorporation of documents*	62
	i. *What documents may be incorporated*	62
	ii. *What is a sufficient reference*	63

SECT. 1.—*Sales, Leases and Mortgages.*

Sales.

AN executory agreement, containing the terms of the contract, almost always precedes a conveyance on sale of land. This is rendered necessary by the circumstance, that the right to land depends upon a title which has to be traced from generation to generation, and from instrument to instrument, and not upon the mere physical fact of possession. Complications of title, and imperfections in the chain of evidence, in almost all cases, make it expedient for a vendor to limit the rights of the purchaser as to his requisitions and objections. It is also desirable that while the vendor is proving his title, and the purchaser is satisfying himself as to its validity, there should be a binding contract to complete the sale if a satisfactory title can be made out. For these reasons it is the almost invariable practice on sales of land,

Chap. II. s. 1.

to enter into a preliminary agreement, the form of which it is intended to examine in the present chapter.

Leases.

The granting of a lease is also sometimes preceded by informal negotiation, which gives rise to questions of considerable difficulty; and in other cases an agreement, executory in form, is signed by the parties, and operates as an effectual demise, although not under seal.

Mortgages.

In the case of mortgages, a preliminary agreement is never entered into, inasmuch as such an agreement is not capable of being enforced; and, accordingly, an intending mortgagor labours under the disadvantage of having to adduce a title to the satisfaction of the mortgagee.

Sect. 2.—*Form of the Agreement.*

Form of agreement.

Agreements on sale vary in form, according as the sale takes place by private contract or by public auction. In the one case the several stipulations of the contract are contained in the articles of agreement, in the other in the conditions of sale. An agreement for sale by private contract, moreover, is an instrument whereby the parties purport to contract; whereas the written record of a sale by auction, which is generally a memorandum endorsed on the particulars and conditions, is a note or memorandum in writing of a contract already made. These differences, however, do not affect the contents of the agreement, which are, in both cases, substantially the same; except, of course, that conditions of sale make provision for the conduct of the auction, in a manner which is unnecessary in an agreement for private sale. Omitting these formal conditions, an agreement for a sale by private contract may be, and indeed often is, constituted by the literal adoption of the conditions of sale. In the present chapter, therefore, it is unnecessary to dwell upon the various clauses which are found in a formal agreement for sale; since the observations under the head of "Conditions of Sale" (*post*, Ch. III.), are equally applicable, whether the particular clause occurs in a printed condition, or in a written agreement. This chapter is chiefly

concerned with the form of the agreement, and the various ways in which it may be entered into.

Must contain all the material terms.

The written agreement must contain all the material terms of the contract: *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Williams* v. *Lake*, 2 El. & El. 349. These are (1) the names of the parties; (2) the description of the property; (3) the consideration; and, in addition to these, in the case of an agreement for a lease, (4) the date of commencement and the length of the term. Before considering these subjects in detail, in order to guard against misapprehension, it should be stated that the agreement may consist of several documents, provided they are proved to be connected (see *post*, *Incorporation of Documents*, p. 62): and further, that the terms above mentioned need only be set forth in such a manner that they may be ascertained, and need not be expressed with formal accuracy.

Sect. 3.—*The Names of the Parties.*

The names of the parties.

The written contract must, in order to satisfy the Statute of Frauds, contain the names of the parties, or the means of identifying them: *Williams* v. *Byrnes*, 9 Jur. N. S. 363. See also *Champion* v. *Plummer*, 5 Esp. 240; *Warner* v. *Willington*, 3 Drew. 523; *Skelton* v. *Cole*, 1 De G. & J. 587. It must be possible to discover from the written document who the vendor is: per Mellish, L. J., *Catling* v. *King*, 5 Ch. D. 660, 665.

"But though this is the general rule, there is this exception, that if it can be ascertained who is the vendor or intended lessor from some other document, which is sufficiently connected with the memorandum by clear reference, that will cure the defect of the memorandum. Thus, if the memorandum is written upon or clearly refers to conditions of sale, which show who is the vendor or intended lessor, that will be sufficient; or if it clearly refers to an advertisement for sale containing the name; or if the purchaser or intended lessee writes or signs a letter, clearly referring to the memorandum, and the letter contains the name of the vendor or intended lessor, that will be suffi-

Chap. II. s. 3.

cient:" per Kindersley, V.-C., *Warner* v. *Willington*, 3 Drew 523, 530; and see *post*, *Incorporation of Documents*, p. 62.

The statute will be satisfied if the parties are so described that they can be identified.

i. Sufficient description.

"The proprietor."

Thus, the vendor has been held to be sufficiently described by the word "proprietor," there being but one person who answered the description: *Sale* v. *Lambert*, L. R. 18 Eq. 1; or even where there was an ambiguity which could be removed by parol evidence: *Rossiter* v. *Miller*, 5 Ch. D. 648; 3 App. Cas. 1124.

"The executors."

When the property was described as belonging to "the late Admiral Ferguson," and the sale was expressed to be made by direction of "the executors," the description was held sufficient: *Hood* v. *Lord Barrington*, L. R. 6 Eq. 218.

"Legal personal representatives."

And in like manner "the legal personal representative of L. D." has been held to be a sufficient description, although the vendor had not at the date of the contract actually acquired that character: *Towle* v. *Topham*, 37 L. T. 308.

"A trustee selling under a trust for sale."

So when the vendor was stated to be "a trustee selling under a trust for sale," and the land was specifically described, the objection that the vendor was not named was overruled. "Of course," said Jessel, M. R., "if a trustee of land, he must be a trustee under some instrument, and there his name will be found. I think that there is here no such danger as the Statute of Frauds intended to guard against with regard to the identification of parties. There may, indeed, be two trustees for sale of the same land under different instruments, as there may be two persons of the name of *John Smith*, and you may require parol evidence in that case to show which it was:" *Catling* v. *King*, 5 Ch. D. 660.

Ascertained by extrinsic circumstances,

The Court is very reluctant to allow so highly technical an objection to prevail, and endeavours to identify the party by a minute examination of the particulars and conditions of sale. When, for example, it appeared on the face of the agreement that the vendors were a company, and were in possession of the property, it was held that the objection could not be sustained: *Commins* v. *Scott*, L. R. 20 Eq. 11.

and by incorporated documents.

When a series of letters, or several documents of any kind together constitute the written agreement of the parties, it will,

of course, be sufficient if the names and other necessary particulars can be ascertained from any one of the incorporated documents: *Warner* v. *Willington*, 3 Drew. 523, 530.

Abstract.

The acceptance of an abstract headed with the vendor's name will cure the defect in an agreement arising from its omission: *Bourdillon* v. *Collins*, 24 L. T. 344.

Summary of the law.

The following summary of the law is taken from the speech of Lord Cairns, L. C., in *Rossiter* v. *Miller*, 3 App. Cas. 1124, at p. 1140.

"In point of fact, my Lords, the question is, Is there that certainty which is described in the legal maxim *Id certum est quod certum reddi potest.* If I enter into a contract, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all these cases there is no such statement, and I apprehend that in none of these cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell *Blackacre* of which I am not proprietor, or to sell the house No. 1, Portland Place, on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise; and I should be surprised if any authority could be found, and certainly none has been produced, to say that a contract under these circumstances would not be valid." Tanner v. Hamlin 24 Ch D. 199.

ii. Insufficient description.

On the other hand, it has been laid down that "the Court ought to be careful not to manufacture descriptions which a jury could not identify:" per Jessel, M. R., *Commins* v. *Scott*, L. R. 20 Eq. 11, 16.

No name or description.

The cases, however, in which the description has been held insufficient are very few. If the name of the vendor does not appear, and there is no description of him, the agreement is incomplete and cannot be enforced: *Warner* v. *Willington*, 3 Drew. 523; *Williams* v. *Jordan*, 6 Ch. D. 517. See *Jacob* v. *Kirk*, 2 Moo. & R. 221; *Donnison* v. *The People's Café Co.*, 45 L. T. 187.

Vendor.

The term "vendor" is not of itself a sufficient description: *Potter* v. *Duffield*, L. R. 18 Eq. 4.

Chap. II. s. 3.

Name left blank.

In an action by the vendor for damages, the purchaser signed an agreement endorsed on the particulars in this form:—"I do hereby acknowledge to have this day bought by public auction of Messrs. Walters & Co., as agents to Mr. ———, the leasehold estate comprised in this particular, &c." Lord Tenterden, C. J., observed: "What a Court of Equity would do in this case, I cannot possibly say; it was the duty of the auctioneer to sign, and I have often had occasion to lament that they do not do so:" *Wheeler* v. *Collier*, 1 M. & M. 123. The learned judge does not seem to distinguish between a *signature* which is only necessary in order to charge a defendant, and the *names of the contracting parties*, which form an essential term of the agreement. Moreover, if the auctioneers in this case had signed the agreement, such signature would not have supplied the name of the vendor.

Undisclosed principal.

If a written contract is made in this form, "A. B. agrees to sell *Blackacre* to C. D. for 1,000*l.*," then E. F., the principal of A. B., can sue G. H., the principal of C. D., on that contract; and *Morris* v. *Wilson* (5 Jur. N. S. 168) appears to have been decided on that principle: per Jessel, M. R., *Commins* v. *Scott*, L. R. 20 Eq. 11, at p. 16. See also *Calder* v. *Dobell*, L. R. 6 C. P. 486; Story on Agency, § 160, a.

That is to say, if an agent purports to contract on his own account, but in reality on behalf of an undisclosed principal, the Statute of Frauds will be satisfied by the agent's name appearing in the contract. If on the other hand an agent describing himself as an agent, but not specifying for whom, enters into such a contract, the agent is not liable, and the name of the true contracting party not appearing, the written agreement does not contain all the requisite terms. See *Beer* v. *London and Paris Hotel Co.*, L. R. 20 Eq. 412.

Recovery of deposit.

Where the purchaser pays a deposit knowing that the vendor's name does not appear in the contract, he cannot afterwards set up the informality of the agreement as a ground for rescinding the contract and recovering the deposit: *Thomas* v. *Brown*, 1 Q. B. D. 714. See, however, *Casson* v. *Roberts*, 31 Beav. 613.

Sect. 4.—*Description of the Property.*

Description of the property.

i. Imperfect on the face of the agreement.

The written agreement must contain some description of the property, but parol evidence seems to be in all cases admissible to supplement an imperfect description; for there cannot be "a description in writing which will shut out all controversy as to parcels, even with the help of a map:" per Jessel, M. R., *Shardlow* v. *Cotterell*, 20 Ch. D. 90, 93.

"Mr. Ogilvie's house" (*Ogilvie* v. *Foljambe*, 3 Mer. 53), "the house, &c., in Newport," assisted by the circumstance that the deeds were stated to be in the possession of a named person (*Owen* v. *Thomas*, 3 My. & K. 353), "the premises," explained by a previous letter which was held to be incorporated in the agreement (*Wood* v. *Scarth*, 2 K. & J. 33), have been held to be sufficient descriptions.

Shardlow v. *Cotterell.*

The case which seems to have gone the farthest in admitting parol evidence to explain an incomplete description is *Shardlow* v. *Cotterell*, 20 Ch. D. 90.

In that case a dwelling house and premises were put up for sale by auction under conditions which contained no description of the property, but from which it appeared by inference that it was real estate. After the sale the auctioneer signed a memorandum written on the conditions in these terms: "The property duly sold to *A. Shardlow*, butcher, *Pinxton*, and deposit paid at close of sale," and at the same time gave the purchaser the following receipt:—"*Pinxton*, March 29, 1880. Received of Mr. A. Shardlow the sum of 21*l.* as deposit on property purchased at 420*l.*, at *Sun Inn*, *Pinxton*, on the above date. Mr. G. Cotterell, owner." It was held by the Court of Appeal, agreeing with Kay, J. (18 Ch. D. 280), that the receipt, the memorandum, and the conditions might be read together as constituting one agreement; and reversing his decision, however, upon this ground, that they contained a sufficient description of the property to enable the Court to receive parol evidence of what property was sold on the day in question at the *Sun Inn*.

The Master of the Rolls (Sir G. Jessel) and Lord Justice Baggallay considered that the receipt alone, without any assist-

Chap. II. s. 4.

ance from the other documents, was sufficient to satisfy the requirements of the statute.

It was also laid down by Jessel, M. R. (p. 93), that there was no distinction between the descriptions required by the fourth section of the Statute of Frauds relating to sales, and the fifth section relating to devises of land, and accordingly that "a decision as to what is a sufficient description in the one case must be an authority as to what shall be a sufficient description in the other case."

Uncertain reservation.

The description of the subject-matter of the contract may also be insufficient on account of a reservation to the vendor, which is void for uncertainty: *Pearce* v. *Watts*, L. R. 20 Eq. 492. But on the ground of fraud an inquiry has been directed in such a case: *Chattock* v. *Muller*, 8 Ch. D. 177.

ii. Description defective through extrinsic circumstances.

The agreement may contain what appears to be a sufficient description of the property sold, and yet be incapable of being enforced, either on the ground of mistake as to what was actually included in the description (*Denny* v. *Hancock*, L. R. 6 Ch. 1, and cases cited *post*, Chap. XXVII.), or it is conceived on the ground of latent ambiguity which cannot be removed. If, for example, in the case already cited of *Ogilvie* v. *Foljambe* (3 Mer. 53), it had transpired that the deeds referred to in the agreement related to several houses, the description, "Mr. Ogilvie's house," would not have been rendered determinate by the reference to the deeds.

Sect. 5.—*The Price.*

An essential part of contract.

The agreement must fix the price or the means of ascertaining it, for "the price is of the essence of a contract for sale": *Milnes* v. *Gery*, 14 Ves. 400, 406; and "constitutes a material part of the bargain": *Elmore* v. *Kingscote*, 5 B. & C. 583.

i. Valuation by named persons.

ii. By arbitration.

iii. "Fair valuation."

The parties may agree that the price shall be fixed by named valuers: *Blundell* v. *Brettargh*, 17 Ves. 232; *Wilks* v. *Davis*, 3 Mer. 507; or by arbitration generally, the appointment of the arbitrators being made at a future time: *Milnes* v. *Gery*, 14 Ves. 400. Or they may agree that the property shall be taken at a fair

valuation: *Gaskarth* v. *Lowther*, 12 Ves. 107. And see *Gregory* v. *Mighell*, 18 Ves. 328, where "a fair and just annual rent, to be fixed and ascertained by two indifferent persons, the one to be chosen by the plaintiff, the other by the defendant," was, on the ground of part performance, referred to the Master to be fixed by him. This case appears, at first sight, to conflict with the rule that the Court will not specifically enforce an agreement to refer to arbitration; but it rests entirely on its own special circumstances, for the lessee had been for twelve years in possession without paying rent, and there was therefore an absolute necessity of fixing some rent.

When specifically enforced.

These three modes of ascertaining the price differ somewhat from each other in their results, for it may be considered settled that an agreement to sell at a "fair valuation" will be specifically enforced: *Gaskarth* v. *Lowther*, 12 Ves. 107; *Milnes* v. *Gery*, 14 Ves. 400, 407; *Wilks* v. *Davis*, 3 Mer. 507; *Morgan* v. *Milman*, 3 De G. M. & G. 24, 34; but that if the parties themselves define the way in which the valuation shall be made, whether by arbitrators named or to be named, unless the price is ascertained in that particular way, the contract cannot be enforced: *Wilks* v. *Davis*, 3 Mer. 507; *Pritchard* v. *Ovey*, 1 J. & W. 396, 402; *Morse* v. *Merest*, 6 Mad. 26; *Darbey* v. *Whitaker*, 4 Drew. 134; *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419. In fact, when "the agreement is, that the price of the estate shall be fixed by arbitrators, and they do not fix it, there is no contract, as the price is of the essence of a contract of sale, and the Court cannot make a contract where there is none:" per Sir W. Grant, M. R., *Gourlay* v. *Duke of Somerset*, 19 Ves. 429, 431. See also *Vickers* v. *Vickers*, L. R. 4 Eq. 529, at p. 536.

The following cases illustrate the above rule:—

Arbitrators not named.

1. If the arbitrators are never appointed by the parties, the contract cannot be enforced: *Milnes* v. *Gery*, 14 Ves. 400; *Agar* v. *Macklew*, 2 Sim. & St. 418. (The case of *Hall* v. *Warren*, 9 Ves. 605, does not appear to be consistent with *Milnes* v. *Gery*.) So if the arbitrators cannot agree upon an umpire, *Collins* v. *Collins*, 26 Beav. 306. A provision in partnership articles for the valua-

Chap. II. s. 5.

tion of a partner's share rests also on a different foundation: *Dinham* v. *Bradford*, L. R. 5 Ch. 519.

Award not made in time.

2. If they do not make their award in the time and manner prescribed by the agreement, the Court cannot substitute itself for the arbitrators and make the award: *Cooth* v. *Jackson*, 6 Ves. 12, 34. See *Wilks* v. *Davis*, 3 Mer. 507; *Darnley* v. *L. C. & D. Ry. Co.*, L. R. 2 H. L. 43. But if the valuation is delayed by the misconduct of the vendor, as, for example, by not permitting the valuers to come upon the land, he cannot take advantage of his own wrong: *Morse* v. *Merest*, 6 Mad. 26. And see *Smith* v. *Peters*, L. R. 20 Eq. 511.

Revocation of authority.

3. Specific performance cannot be decreed where the authority of the arbitrators is revoked by the death of one of the parties before award (*Blundell* v. *Brettargh*, 17 Ves. 232; *Morgan* v. *Milman*, 3 De G. M. & G. 24), or by an express prohibition against proceeding with the valuation (*Vickers* v. *Vickers*, L. R. 4 Eq. 529), for the Court has no jurisdiction over the valuer to compel him to proceed.

Valuation and arbitration.

It is not strictly accurate to speak of the price being in ordinary cases ascertained by arbitration; although that form of expression is very frequently adopted. See *Collins* v. *Collins*, 26 Beav. 306, and cases there cited.

It is in some cases difficult to determine whether the particular reference is an arbitration or merely a valuation. If it amounts to the former, the statutes relating to arbitration, including the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), of course apply; but not if it be only a valuation.

The distinction on which the cases turn is, that in an arbitration there must be an existing difference before the matter is referred: *Collins* v. *Collins*, 26 Beav. 306; *Bos* v. *Helsham*, L. R. 2 Ex. 72. But in a later case, Cockburn, C. J., said: "The authorities cited no doubt establish the proposition that when the matter to be determined by the referee is merely one of value, that is not, strictly speaking, an arbitration. I am not at all disposed to quarrel with the cases of *Collins* v. *Collins* and *Bos* v. *Helsham*, looking at the facts upon which they were

decided; but I think they must not be taken to comprehend every case of compensation or value, as when, in ascertaining the value of the property or amount of compensation to be paid, the matter assumes the character of a judicial inquiry, to be conducted upon the ordinary principles upon which judicial inquiries are conducted, by hearing the parties and the evidence of their witnesses": *Re Hopper*, L. R. 2 Q. B. 367, 372. The same view seems to be taken by Sir W. P. Wood, V.-C., in the following passage: "If there be a clear right to have some

of damages ascertained in some way, and that the valuers have to adjudicate on a point of right between the parties, arising out of the to be a simple valuation, and becomes an *Ayres* v. *Pickers*, L. R. 4 Eq. 529, 535.

is of considerable importance with respect to the referee's authority; for, as the reference is either party may revoke the appointment of determine his authority at any time before the been actually made. But it is presumed that le for revocation without sufficient cause on ench of contract: *Livingston* v. *Ralli*, 5 E. & one party delegates to the other or his agent price, he cannot afterwards revoke that dele- See *Northampton Gas Light Co.* v. *Parnell*, also either party may at common law revoke of an arbitrator at any time before the award *Case*, 8 Co. Rep. 81 b. This common law

Revocation of submission.

Chap. II. s. 5.

(17 & 18 Vict. c. 125), do not further interfere with the right of either party to revoke the authority of an arbitrator, for sect. 7 deals only with cases within the previous Act of Will. IV., and sect. 17, which enables every submission to be made a rule of Court unless a contrary intention is apparent, does not thereby bring such submissions within the 39th section of 3 & 4 Will. IV. c. 42. And, accordingly, unless the submission contains an express clause that it may be made a rule of Court, it is revocable by either party before award: *Mills* v. *Bayley*, 2 H. & C. 36; *Re Rouse & Meier*, L. R. 6 C. P. 212; *Thomson* v. *Anderson*, L. R. 9 Eq. 523; *Randell* v. *Thompson*, 1 Q. B. D. 748; *Fraser* v. *Ehrensperger*, 12 Q. B. D. 310. A general agreement, however, to refer all matters in dispute to arbitration is irrevocable: *Piercy* v. *Young*, 14 Ch. D. 200; *Christie* v. *Noble*, W. N. (1880) 71; *Moffat* v. *Cornelius*, 26 W. R. 914. Independently of the submission being made a rule of Court, it may, under special circumstances, be treated as irrevocable on equitable grounds. See *Harcourt* v. *Ramsbottom*, 1 J. & W. 505; *Pope* v. *Duncannon*, 9 Sim. 177.

Valuation of subsidiary items.

The Court, as already stated, has no power to decree specific performance of a contract when the price is to be fixed by arbitration, unless the arbitrators have actually fixed the price. But this rule does not extend to cases in which the property is sold for an ascertained sum, and a non-essential adjunct is to be taken at a valuation. The Court, indeed, has no more power to direct a valuation to be made of a part than of the whole property; but it will enforce specific performance of the contract, so far as the price is ascertained, and allow the plaintiff to abandon the rest.

"Plant, machinery and utensils."

Thus, an agreement for the sale of a mansion house and bleach works, at the price of 7,770*l.*, was not invalidated by an unperformed condition that the "plant, machinery and utensils" should be taken at a valuation: *Jackson* v. *Jackson*, 1 Sm. & G. 184.

"Tenant's fixtures, furniture and stock-in-trade."

But in another case where it was provided that the tenant's fixtures, furniture and stock-in-trade, should be taken at a valuation, specific performance was refused: *Darbey* v. *Whitaker*, 4 Drew. 134.

The question whether the adjunct which is to be valued is essential or not depends on the circumstances of each particular case; but the relative values of the property and the adjunct, and also the possibility of severance, are matters to be taken into consideration. The cases rest on the same principle as that which applies when there is a failure of title to some minor and subsidiary part of the property. "With regard to that which is not absolutely essential to the enjoyment of the estate, and is but a small adjunct to the purchase, the Court may, if a good title cannot be made to the adjunct, direct an inquiry whether it is essential to the enjoyment of the whole:" per Lord Hatherley, L. C., in *Richardson* v. *Smith*, L. R. 5 Ch. 648, 652. In this case the purchase-money was 24,000*l.*, and the value of the subsidiary articles about 2,000*l.* And the Lord Chancellor, in decreeing at the suit of the purchaser specific performance of the contract, except so far as it related to the subsidiary articles, said that an attempt was there made to push the doctrine of *Milnes* v. *Gery*, which had already been carried quite far enough, to an extent which would be utterly unwarrantable.

"Fixtures, furniture and other effects."

When the agreement for sale of a public house provided that the fixtures, furniture and other effects, should be taken at a valuation to be made by a named person, who undertook the valuation, but was refused access to the house by the vendor, the Court on an interlocutory application made a mandatory order to compel the vendor to allow the valuation to proceed. "Can it be tolerated," said Sir G. Jessel, M. R., "in a country in which violence is not allowed, that a Court of Justice shall say no provision can be found for such a case, and that it shall be permitted to a defendant to say, 'Although I have sold this furniture and fixtures at a valuation to be made by a valuer of my own choice, I will obstruct him in the performance of his duty, and prevent his completing the valuation which I have already contracted he shall make.' I do not believe it to be the law of this Court, and I do not believe it will ever be so decided:" *Smith* v. *Peters*, L. R. 20 Eq. 511.

Valuation, how made.

Fraud or gross mistake on the part of the referees prevents the valuation from binding the parties; and, even if the valua-

Chap. II. s. 5.

tion has not been "properly and discreetly made," specific performance will be refused: *Emery* v. *Wase*, 5 Ves. 846; 8 Ves. 505; and see *Gourlay* v. *Duke of Somerset*, 19 Ves. 429.

Amount of valuation.

On a question of amount the Court will be slow to differ from, or correct, the judgment of the valuers. "Mere difference in value, though considerable, is not of itself a sufficient ground for refusing specific performance of a contract. But very considerable difference in value is not inconsiderable evidence that it was not made with great care and attention": *Emery* v. *Wase*, 8 Ves. 517.

Mistake in subject-matter,

or legal principle a ground for setting aside the award.

If there is mistake in point of subject-matter—that is, if a particular thing is referred to an arbitrator, and he has mistaken the subject-matter on which he ought to make his award, or if there is a mistake in point of legal principle going directly to the basis on which the award is founded—these are subjects on which he ought to be examined, and also grounds for setting aside his award: per Sir G. M. Giffard, V.-C., *In re Dare Valley Ry. Co.*, L. R. 6 Eq. 429, 435.

Evidence of arbitrator.

The admissibility of the arbitrator's evidence was elaborately discussed in the case of the *Duke of Buccleuch* v. *Met. Board of Works*, L. R. 5 H. L. 418; and it may be considered as settled, that the arbitrator is a competent witness as to what took place before him, so as to show over what subject-matter he was exercising jurisdiction; but that as regards the effect of the award his evidence is not admissible to show how it was arrived at, or the intention of the arbitrator when he made it. "The award," said Lord Cairns in that case at p. 462, "is a document which must speak for itself, and the evidence of the umpire is not admissible to explain, or to aid, much less to contradict what is to be found upon the face of that written instrument."

Duty of arbitrator.

A referee cannot delegate his authority: *Lingood* v. *Eade*, 2 Atk. 501; *Hopcraft* v. *Hickman*, 2 Sim. & St. 130; but he may make use of the judgment of another upon whom he can depend; and the valuation of that person is his, if he chooses to adopt it: *Emery* v. *Wase*, 5 Ves. 846, 848; *Anderson* v. *Wallace*, 3 Cl. & F. 26; *Eads* v. *Williams*, 4 De G. M. & G. 674; but it was held in the last case to be a valid objection to a valuation that one of the referees adopted, contrary to his own judgment,

the valuation of the umpire, because "it was useless his standing out, as there were two to one against him."

Liability of valuer.

An *arbitrator* is placed in the position of a judge selected by the parties, and seems not to be liable for mere negligence; but a *valuer* is liable to an action for exercising his calling or profession without due skill: *Turner* v. *Goulden*, L. R. 9 C. P. 57.

When two valuers are appointed with recourse to an umpire in the event of a difference between them, there is no arbitrament until the umpirage takes effect: *Ibid.* 61.

Award, when set aside.

The definition of a good award is that it gives dissatisfaction to both parties, and the Court receives evidence of the merits only so far as it may tend to throw light upon the conduct of the arbitrators. "The decision must be final and conclusive, unless the plaintiff can fix upon them corruption, partiality, misconduct, or irregularity. The *onus* of proving that lies upon him:" per Sir W. Grant, M. R., *Goodman* v. *Sayers*, 2 J. & W. 249, 260.

Fraud or partiality.

An award may be set aside for fraud (*Lord Lonsdale* v. *Littledale*, 2 Ves. jun. 451; and see *Tittenson* v. *Peat*, 3 Atk. 529; *Sumpter* v. *Life*, Dick. 497), partiality (*Burton* v. *Knight*, 2 Vern. 514; *Chicot* v. *Lequesne*, 2 Ves. sen. 315; *Ormes* v. *Beadel*, 2 Giff. 166), the fraudulent or forcible exclusion of one arbitrator (*Burton* v. *Knight*, 2 Vern. 514), the exclusion of evidence (*In re Hawley and The North Staffordshire Ry. Co.*, 2 De G. & S. 33), interviews between the arbitrators and one of the parties in the absence of the other (*Harvey* v. *Shelton*, 7 Beav. 455; *Moseley* v. *Simpson*, L. R. 16 Eq. 226), or the refusal by the arbitrator to hear one of the parties (*Re Maunder*, 49 L. T. 535).

Waiver of irregularities.

But irregularities in the mode of conducting an arbitration, which would entitle a party to set aside the award, may be waived by delay or acquiescence: *Parrott* v. *Shellard*, 16 W. R. 928; *Mills* v. *Society of Bowyers*, 3 K. & J. 66; *Moseley* v. *Simpson*, L. R. 16 Eq. 226.

Injunction.

An injunction may be granted to restrain an arbitrator from acting, if in the opinion of the Court he is unfit or incompetent to act: *Beddow* v. *Beddow*, 9 Ch. D. 89; and see *Malmesbury Ry. Co.* v. *Budd*, 2 Ch. D. 113. A notice of motion to set

Chap. II. s. 5.

aside an award should specify the grounds of objection: *Mercier* v. *Pepperell*, 19 Ch. D. 58.

Specific performance.

Whenever an award would be set aside, specific performance of a contract depending on the award would, it is conceived, be refused: see *Chichester* v. *M'Intyre*, 1 Dow. & Cl. 460; but in the absence of fraud, mistake, or miscarriage, the Court will enforce the contract, although the valuation appears high, and even exorbitant: *Collier* v. *Mason*, 25 Beav. 200.

Sect. 6.—*Contracts for Leases.*

Duration of lease.

If parties contract together for the purchase of a house, *primâ facie* the contract is to purchase the fee simple, or if the vendor has only a limited interest, the whole of such interest; but if the agreement contains words which refer to the granting of a lease, it cannot be construed as an agreement for a sale, although in such an event the consequence may be that the agreement is invalid, as not containing the term for which the lease was to be granted: *Cox* v. *Middleton*, 2 Drew. 209; *Dolling* v. *Evans*, 15 W. R. 394.

Terms which must appear in contract for lease.

In the case of a contract to grant a lease not only must the names of the lessor and lessee, the description of the property, and the amount of the rent appear in the agreement, but also the commencement and duration of the term must be specified: *Blore* v. *Sutton*, 3 Mer. 237; *Marshall* v. *Berridge*, 19 Ch. D. 233, overruling *Jaques* v. *Millar*, 6 Ch. D. 153; and see *Nesham* v. *Selby*, L. R. 13 Eq. 191; *Ibid.* 7 Ch. 406; *Rock Portland Cement Co.* v. *Wilson*, 31 W. R. 193. It is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements: per Lindley, L. J., *Marshall* v. *Berridge*, 19 Ch. D. 244. If the agreement amounts to a present demise, and the tenant is in possession, the date of the

agreement fixes the commencement of the term: *Doe* d. *Philip* v. *Benjamin*, 9 Ad. & E. 644; and see as to the commencement of a term created by lease under seal, Co. Lit. 46 b.

Duration of underlease.

On the construction of an informal agreement for an underlease, the duration was determined to be the residue of the term less one day, if the underlessee should so long live: *Kusel* v. *Watson*, 11 Ch. D. 129.

Sect. 7.—*Rights of Pre-emption.*

Pre-emptions.

Options of purchasing a certain property at a certain price, or at a price to be ascertained in a particular manner, are not unfrequently conferred by wills, leases, and partnership articles, and similar options are sometimes given to adjoining owners by special agreement or under statute. When a donee of an option declares his intention of exercising it, a contract is thereby completed, which may be enforced on either side: *Earl of Radnor* v. *Shafto*, 11 Ves. 448; *Edwards* v. *West*, 7 Ch. D. 858.

Conversion by exercise of option.

The contract is constituted by the exercise of the option, and there is no conversion of the property before that time: *Ibid*; with this exception, however, that when there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, the purchase-money goes to his personal and not his real representatives: *Lawes* v. *Bennett*, 1 Cox, 167; *Townley* v. *Bedwell*, 14 Ves. 591; *Weeding* v. *Weeding*, 1 J. & H. 424; *Collingwood* v. *Row*, 26 L. J. Ch. 649; *Drant* v. *Vause*, 1 Y. & C. C. 580.

i. Option given by will.

When a right of pre-emption is given by will at a price to be fixed by trustees, and the trustees will not act, the Court will direct an inquiry as to what is a reasonable price: *Earl of Radnor* v. *Shafto*, 11 Ves. 448.

If the trustees have power to fix "a fair and reasonable value," they will not, in the absence of fraud, be restrained at the instance of the beneficiaries from selling at the price which they have named: *Edmonds* v. *Millett*, 20 Beav. 54.

Right lost by non-compliance with conditions,

The conditions annexed to the option by the will must be strictly complied with. Thus, the right of pre-emption is lost

Chap. II. s. 7.

by not paying the purchase-money within the specified time: *Dawson* v. *Dawson*, 8 Sim. 346; even though notice of the intention to purchase is duly given, and the delay is occasioned by non-delivery of an abstract of title: *Brooke* v. *Garrod*, 2 De G. & J. 62. See also *Evans* v. *Stratford*, 2 H. & M. 142; *Lord Lilford* v. *Powys Keck*, 30 Beav. 295; *Austin* v. *Tawney*, L. R. 2 Ch. 143.

or by non-exercise.

If a testator offers an estate to a particular person at a price to be fixed by his trustees, and that person does no act in his life signifying what he will do, his interest cannot be longer than his life, and will not descend to his real representative: *Earl of Radnor* v. *Shafto*, 11 Ves. 448, 456.

Not by compulsory sale.

When, however, land subject to an option of purchase is taken by a railway company, at a price exceeding the sum fixed by the testator, the option subsists, and the donee is entitled to the difference between the two sums: *Re Cant*, 4 De G. & J. 503.

ii. Option given to a lessee.

A stipulation is occasionally inserted in leases that the lessee, upon giving notice to the lessor before a certain day, or during the continuance of the demise, may purchase the freehold at a named price. Such a stipulation is not a mere offer on the part of the lessor capable of being retracted before acceptance, but is an agreement for valuable consideration, and may be specifically enforced at the suit of the tenant.

a. To purchase freehold.

The conditions under which the option is to be exercised must be construed strictly: *Pegg* v. *Wisden*, 16 Beav. 239; *Ranelagh* v. *Melton*, 2 Dr. & Sm. 278; *Weston* v. *Collins*, 13 W. R. 510; for the person on whom a privilege is conferred must bring himself within the precise terms on which it is offered: *Davis* v. *Thomas*, 1 R. & My. 506.

A condition, however, as to time has in such a case been construed not to be "of the essence": *Pegg* v. *Wisden*, 16 Beav. 239; and a right of purchase has been held to be independent of a right to a lease, and to be unaffected by the forfeiture of the latter, although they were conferred by the same writing: *Green* v. *Low*, 22 Beav. 625.

Time of conversion as regards lessor's estate;

As between the real and personal representatives of the lessor, the exercise by the lessee of his option to purchase relates back to the death of the lessor, and the purchase money accordingly

forms part of his personal estate: *Lawes* v. *Bennett*, 1 Cox, 167.

as regards lessee's estate.

But this doctrine does not apply to the interest of the lessee. Thus, where a lease contained a covenant by the lessor that if the lessee, his executors, administrators, or assigns should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice thereof in writing to the lessor, his heirs, or assigns, then the lessor, his heirs, or assigns would make out a title and accept 1,200*l.* for the purchase of the land, and duly convey the same to the lessee, his executors, administrators, or assigns, it was held that the option to purchase was an integral part of the lease and passed with it, and accordingly, that the lessee having died without exercising the option, the right vested in his administrator as part of his personal estate: *In re Adams and The Kensington Vestry*, 27 Ch. D. 394.

This decision is in conflict with a passage in Lord Eldon's judgment in *Daniels* v. *Davison*, 16 Ves. 253, where, referring to the case of *Lawes* v. *Bennett* (1 Cox, 167), *sub nom. Douglas* v. *Whitrong*, he says: "Lord Kenyon held that the benefit of that agreement should go to the heir, the executor paying for the purchase; and the lessee, when he made the option, was to be considered the owner *ab initio*: a strong decision." There is clearly a mistake here between the lessor and lessee, for in *Lawes* v. *Bennett* the option was enforced by the assignee of the lease against the heir of the lessor. "It is to be borne in mind," said Mr. Justice Fry, in *Edwards* v. *West*, 7 Ch. D. 858, 863, "that no authority can be produced which has extended the doctrine of *Lawes* v. *Bennett* in the slightest degree beyond what was decided in that case"; and he held that the lessee could not, by exercising his option after a fire had occurred, give himself a title to the insurance moneys received by the landlord. See also *Reynard* v. *Arnold*, L. R. 10 Ch. 386.

Where a tenant in possession has an option of purchase, whether conferred by his lease or by a collateral agreement, a purchaser from the lessor, being fixed with constructive notice of the tenant's equitable rights, will not be permitted to set up, as against the tenant claiming to exercise his option, the plea of

Chap. II. s. 7.

a purchase for value without notice: *Daniels* v. *Davison*, 16 Ves. 249.

b. To renew the lease.

The right to renew the lease, either for one term, or as often as occasion shall arise, is sometimes given to the lessee.

Covenants for perpetual renewal are not favoured by the Courts: *Baynham* v. *Guy's Hospital*, 3 Ves. 295. The law is, however, now settled, "that if parties clearly express in the covenant their intention to renew, it must be so construed and enforced. But that intention must be clearly and distinctly apparent from the reading of the instrument, and must be free from ambiguity": *Brown* v. *Tighe*, 2 Cl. & F. 396, 417. See also *Sheppard* v. *Doolan*, 3 Dr. & War. 1; *The Copper Mining Co.* v. *Beach*, 13 Beav. 478.

The presumption of law against a perpetuity has no effect if the intention of the parties is plain: *Ex parte Clarke*, I. R. 6 Eq. 51; approved and followed in *Swinburne* v. *Milburn*, 32 W. R. 400.

"The experience of the Court is that renewable leases are wasteful": per Jessel, M.R., *In re Henry Smith's Charity*, 20 Ch. D. 516; and accordingly in that case a clause sanctioning renewable leases was struck out of a charity scheme.

Covenant to renew, whether perpetual.

It is a question of construction depending on the terms of the lease, whether a covenant to grant a renewed lease containing the same covenants as the original lease includes the covenant of renewal or not. The general tendency has been, beyond question, to decide in favour of only one renewal, excluding the covenant in the renewed lease. See *Hyde* v. *Skinner*, 2 P. Wms. 196; *Tritton* v. *Foote*, 2 Bro. C. C. 636; *Iggulden* v. *May*, 7 East, 237; *Brown* v. *Tighe*, 2 Cl. & F. 396; *Walmesley* v. *Pilkington*, 35 Beav. 362, cases which must be taken as overruling Lord Hardwicke's *dictum* in *Furnival* v. *Crew*, 3 Atk. 83, that "a covenant to grant a new lease under the same rents and covenants includes and takes in the covenant for renewal as well as any other covenant."

If the covenant be to execute a renewed lease "at the same rent and subject to the same covenants, *including this present covenant*, it will be construed as a covenant for perpetual renewal, and the lessee will be entitled to a covenant for renewal

in the renewed lease *totidem verbis* with that of the original lease, the name of the new *cestui que vie*, in the case of a lease for lives, being substituted for that of the deceased: *Hare* v. *Burges*, 4 K. & J. 45. See also *The Copper Mining Co.* v. *Beach*, 13 Beav. 478; *Job* v. *Banister*, 2 K. & J. 374; *Swinburne* v. *Milburn*, 32 W. R. 400.

The Court leans against a construction which confers a right of perpetual renewal, and the fact that repeated renewals have been made will be disregarded in determining the true construction of the clause: *Baynham* v. *Guy's Hospital*, 3 Ves. 295; *Eaton* v. *Lyon*, *Ibid.* 690; *Iggulden* v. *May*, 9 Ves. 325, overruling *Cooke* v. *Booth*, Cowp. 819.

Conditions precedent must be satisfied.

A renewal of a lease is a privilege to which the tenant is entitled only on fulfilling all the conditions of his legal bargain: *Finch* v. *Underwood*, 2 Ch. D. 310. And therefore if the payment of rent (*Davis* v. *Thomas*, 1 R. & My. 506), or the performance of the covenants (*Job* v. *Banister*, 2 K. & J. 374; *Finch* v. *Underwood*, 2 Ch. D. 310; *Bastin* v. *Bidwell*, 18 Ch. D. 238), or a request for renewal to be made before a given time (*City of London* v. *Mitford*, 14 Ves. 41; *Nicholson* v. *Smith*, 22 Ch. D. 640, 657), is a condition precedent to renewal, such a condition must be strictly satisfied, and no relief will be given as for a forfeiture.

A covenant to grant a renewed lease "in case the covenants and agreements on the tenant's part shall have been duly observed and performed," does not mean that the tenant must have strictly observed and performed the covenants all through the term, but only that there shall be no existing right of action when the lease is applied for: *Finch* v. *Underwood*, 2 Ch. D. 310.

Receipt of rent with knowledge of existing breaches waives a forfeiture, but not a condition precedent to the renewal of a lease: *Ibid.*

Rights not lost by delay, lessee being in possession.

Where an agreement for a yearly tenancy conferred on the tenant an option of taking a lease for seven, fourteen, or twenty-one years, it was decided that the tenant might exercise his option after receiving notice to quit; and that he had not lost his right to do so by long delay. The landlord's remedy in

Chap. II. s. 7.

such a case is, if he wishes to reduce the contract to certainty, to call on the tenant to exercise his option, and in default of his doing so, to determine the tenancy: *Hersey* v. *Giblett*, 18 Beav. 174.

So, also, if no time is fixed within which a renewed lease is to be applied for, and the lessee continues in possession, a renewal may be obtained after the expiration of the original term: *Moss* v. *Barton*, L. R. 1 Eq. 474; *Buckland* v. *Papillon*, L. R. 2 Ch. 67.

Who entitled to call for renewal.

The right to renewal seems *primâ facie* to pass with the lease, and to belong to the person entitled thereto. Accordingly the trustee in bankruptcy (*Buckland* v. *Papillon*, L. R. 2 Ch. 67), or the personal representative (*Hyde* v. *Skinner*, 2 P. Wms. 196; *Re Adams and The Kensington Vestry*, 27 Ch. D. 394), or the assignee (*Crosbie* v. *Tooke*, 1 My. & K. 431; *Morgan* v. *Rhodes*, *Ibid.* 435), of the lessee is entitled to exercise the option. But one of two lessees to whom the option is given, cannot, at all events during the lifetime of his co-lessee, require a lease to be granted to himself alone: *Finch* v. *Underwood*, 2 Ch. D. 310.

iii. Partnership articles.

A clause in partnership articles giving a right of pre-emption over certain property may be binding after the expiration of the original term. Thus, where two persons agreed to carry on business upon certain freehold premises for fourteen years, and in case either of them should die during the term, that the survivor should purchase the share of the deceased partner in the freeholds at a fixed price; and after the expiration of the fourteen years they agreed by parol to continue the partnership "on the old terms," it was held that the stipulation as to purchase was binding, and that as between the real and personal representatives of the deceased partner, the freeholds were converted into personal estate: *Essex* v. *Essex*, 20 Beav. 442. See also *Cox* v. *Willoughby*, 13 Ch. D. 863, where *Cookson* v. *Cookson*, 8 Sim. 529, is treated as inconsistent with *Essex* v. *Essex*, and of doubtful authority.

iv. Rights of re-purchase.

A covenant conferring an option of purchase creates an equitable interest in the land; and is, if unlimited in point of time, void as contravening the rule against perpetuities: *L. & S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 562, overruling *Birmingham Canal*

Co. v. *Cartwright*, 11 Ch. D. 421, and a *dictum* to the opposite effect in *Gilbertson* v. *Richards*, 4 H. & N. 277, 297.

It may, of course, be so framed as to create not a right binding the land, but merely a personal privilege in favour of the covenantee; in that case, however, it could not be enforced against an assignee of the land, whether he took with notice or not: *L. & S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 562. And see *Haywood* v. *The Brunswick Benefit Building Society*, 8 Q. B. D. 403.

Although an agreement was expressed to be for a right of pre-emption "at all times thereafter," it was held to be limited to the life of the owner of the property: *Stocker* v. *Dean*, 16 Beav. 161; and a clause in a local Act of Parliament requiring a company, before disposing of any land taken under the powers of the Act, "to offer the same to the person or persons of whom the same were purchased," has conversely been read as conferring a right of pre-emption only on the original vendors, and not on their successors in title: *Highgate Archway Co.* v. *Jeakes*, L. R. 12 Eq. 9.

Where the option is to be exercised within a limited time, that time must be precisely observed: *Barrell* v. *Sabine*, 1 Vern. 268. The terms of the proviso for re-purchase must be strictly complied with: *Ensworth* v. *Griffiths*, 5 Bro. P. C. 184. See also *Joy* v. *Birch*, 4 Cl. & F. 57; *Alderson* v. *White*, 2 De G. & J. 97.

Rights of pre-emption are conferred upon adjoining owners in the event of a sale of superfluous lands under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 128, as to which see *post*, Ch. VII. This section is incorporated in the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 6; and in the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 175, 176.

v. Lands Clauses Act, s. 128.

Sect. 8.—*Offer and Acceptance.*

Offer and acceptance.

A contract entered into by an offer on one side, and an acceptance of such offer on the other, possesses some peculiarities to which reference must now be made. Some time almost always elapses between the offer and the reply, and during that interval there is no concluded contract, yet the party who makes the offer is to some extent bound, while the other party is free. Very often, too, the acceptance is not unqualified, but introduces some new term, which, in its turn, must be accepted by the opposite party, before a binding contract is concluded. The cases in which questions of this kind most frequently arise are those where the negotiations between the parties are conducted by letters, and the difficulty always is to point out any one moment when the parties are *ad idem*, when the phase of negotiation has passed, and that of contract has commenced.

Parol acceptance of written offer.

An offer in writing may be accepted by parol, and thereupon such offer is, if it contains all the terms, a sufficient memorandum to satisfy the requirements of the Statute of Frauds: *Coleman* v. *Upcot*, 5 Vin. Abr. 527; *Warner* v. *Willington*, 3 Drew. 523; *Smith* v. *Neale*, 2 C. B. N. S. 67; *Watts* v. *Ainsworth*, 31 L. J. Ex. 448; *Reuss* v. *Picksley*, L. R. 1 Ex. 342. In *Beresford* v. *Batthyany* (27 Sol. Journ. 103, W. N. (1882) 171) some doubt was thrown upon the above proposition, though it was considered to be binding upon the courts of first instance. After the death of the person who made the offer, the contract may be enforced against his representatives: *Benecke* v. *Chadwicke*, 4 W. R. 687. An acceptance may also be given by telegram: *Godwin* v. *Francis*, L. R. 5 C. P. 295.

Offer must be accepted without qualification.

In order to constitute an agreement by letters, the answer to the written proposal must be a simple acceptance of the terms proposed, without the introduction of a new term: *Holland* v. *Eyre*, 2 Sim. & S. 194; *Warner* v. *Willington*, 3 Drew. 523, 533; *Appleby* v. *Johnson*, L. R. 9 C. P. 158; *Crossley* v. *Maycock*, L. R. 18 Eq. 180.

Where a person offered to purchase a house upon certain terms, "possession to be given on or before 25th July," and all the terms were agreed to, except that possession was not to be

given until the 1st August, the variance was held to be fatal: *Routledge* v. *Grant*, 4 Bing. 653. *Secus* where no time had been mentioned in the offer, and the acceptor merely added, "We hope to give you possession by the half-quarter day": *Clive* v. *Beaumont*, 1 De G. & S. 397.

So the assent by the lessor's solicitors to the alterations in a draft, except one whereby the intended lessee had expunged a covenant restraining assignment without licence, left the contract incomplete: *Lucas* v. *James*, 7 Hare, 410. See *Forster* v. *Rowland*, 7 H. & N. 103; *Oriental Inland Steam Co.* v. *Briggs*, 4 De G. F. & J. 191; *Stanley* v. *Dowdeswell*, L. R. 10 C. P. 102.

Qualified acceptance is a fresh offer.

An acceptance qualified by the addition, omission, or modification of any term, amounts to a fresh offer made to the opposite party, and must be accepted without further qualification in order to constitute a contract: *Lucas* v. *James*, 7 Hare, 410; *Honeyman* v. *Marryat*, 21 Beav. 14. But a mere reference to the preparation of a formal agreement does not prevent the existence of a binding contract: *Gibbins* v. *Metropolitan Asylum District*, 11 Beav. 1; *Cayley* v. *Walpole*, 18 W. R. 782; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70.

Withdrawal of offer.

An offer may be retracted at any time before acceptance, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not: *Routledge* v. *Grant*, 4 Bing. 653. See also *Cooke* v. *Oxley*, 3 T. R. 653; *Head* v. *Diggon*, 3 M. & Ry. 97; *Horsfall* v. *Garnett*, 6 W. R. 387; *Hebbs' Case*, L. R. 4 Eq. 9; *Dickinson* v. *Dodds*, 2 Ch. D. 463. But the retractation must reach the opposite party before the offer has been accepted: *Byrne* v. *Tienhoven*, 5 C. P. D. 344. See also *Stevenson* v. *McLean*, 5 Q. B. D. 346.

Special acceptance.

An offer may prescribe conditions on which it must be accepted. For example, the offer may fix a time within which it must be accepted; or it may require the other party to supply a term in the agreement, in which case there must be a special acceptance in writing in order to satisfy the Statute of Frauds: *Boys* v. *Ayerst*, 6 Mad. 316. But, in the absence of special stipulation, the person to whom the offer is made has a

Chap. II. s. 8.

reasonable time for its acceptance: *Kennedy* v. *Lee*, 3 Mer. 441, 454; *Meynell* v. *Surtees*, 3 W. R. 535; *Williams* v. *Williams*, 17 Beav. 213.

Reasonable time.

What is a "reasonable time" depends on the nature of the property, and it is clear that an offer to sell goods, the price of which is liable to rapid variations, must be accepted more promptly than an offer to sell or let land. Even in the case of goods, however, there is no implied condition arising from mercantile usage that the offer shall be accepted by the next post: *Dunlop* v. *Higgins*, 1 H. L. C. 381.

In all offers duly communicated there seems to be implied a representation that it may be accepted within a reasonable time, and if the offerer sell to another without waiting for the expiration of the reasonable time, and without an express retractation of his offer, he will be liable in damages: *Ibid.*

An offer by telegram implies the expectation of a prompt reply, and a letter by return of post may be too late: *Quenerduaine* v. *Cole*, 32 W. R. 185.

How an offer may be withdrawn.

A withdrawal of the offer may be made by express words, or by an act inconsistent with its continuance, such as selling the property to a third person: *Dickinson* v. *Dodds*, 2 Ch. D. 463; and it seems that such a sale will be an effectual withdrawal of the offer, even if the person to whom the offer was first made had no knowledge of the sale: *Ibid.* See, however, *Stevenson* v. *McLean*, 5 Q. B. D. 346.

Communication of acceptance.

The acceptance ought to be communicated to the person who made the offer: *Mozley* v. *Tinkler*, 1 Cr. M. & R. 692; *Thornbury* v. *Bevill*, 1 Y. & C. C. 554; *Hebbs' Case*, L. R. 4 Eq. 9. This, however, cannot be regarded as a condition precedent to the constitution of the contract, but rather as a reasonable precaution the neglect of which may amount to *laches*.

Time when contract complete.

Where an offer is accepted by letter, the posting of the letter is the completion of the contract: *Adams* v. *Lindsell*, 1 B. & Ald. 681; *Potter* v. *Sanders*, 6 Hare, 1; *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Harris' Case*, L. R. 7 Ch. 587; *Wall's Case*, L. R. 15 Eq. 18; *Taylor* v. *Jones*, 1 C. P. D. 87; *Brogden* v. *Met. Ry. Co.*, 2 App. Cas. 666, 692.

But the contract dates only from the time of acceptance, and does not relate back to the time when the offer was made: *Dickinson* v. *Dodds*, 2 Ch. D. 463.

Default of the Post Office.

The contract is complete on the posting of the letter containing the acceptance, though the letter be lost through the fault of the Post Office: *Duncan* v. *Topham*, 8 C. B. 225; *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216; overruling *British and American Telegraph Co.* v. *Colson*, L. R. 6 Ex. 108.

The Post-office mark is not conclusive as to the time when a letter is posted: *Stocken* v. *Collin*, 7 M. & W. 515.

What is an acceptance.

An acceptance must be something more than a mere mental assent: *Brogden* v. *Met. Ry. Co.*, 2 App. Cas. 666. Thus, a letter sent to the agent of the writer, or confided to his own messenger (*Hebbs' Case*, L. R. 4 Eq. 9), does not preclude the party from stopping the acceptance *in transitu* before it reaches the other party.

But the posting of a letter to the opposite party is "an extraneous act which clenches the matter": per Lord Blackburn, *Brogden* v. *Met. Ry. Co.*, 2 App. Cas. 666, 691. And so may be the sending of a draft lease: *Warner* v. *Willington*, 3 Drew. 523.

It seems that an unaccepted offer is not assignable: *Meynell* v. *Surtees*, 3 Sm. & G. 101, 116; 3 W. R. 535.

Rejected offer is at an end.

If an offer is definitely rejected, the person to whom it is made cannot afterwards revive the proposal by tendering an acceptance: *Hyde* v. *Wrench*, 3 Beav. 334.

Sect. 9.—*Contract by Letters.*

Contract by letters.

Where a contract has to be made out by letters, the whole correspondence must be taken into consideration. "You must not at one particular time draw a line and say, 'We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.' In order fairly to estimate what was arranged and agreed, you must look at the whole of that which took place and passed between them":

Chap. II. s. 9.

per Lord Cairns, L.C., *Hussey* v. *Horne-Payne*, 4 App. Cas. 311, 316. See *Pym* v. *Campbell*, 6 E. & B. 370; *Williams* v. *Brisco*, 22 Ch. D. 441.

Thus, two letters which apparently constitute a complete contract may, by subsequent letters, be shown not to have contained material terms, and, therefore, not to express the real agreement of the parties: *Ibid.*

Construction of correspondence.

It has been laid down by Lord Erskine that, "the Court is not to decree performance, unless it can collect upon a fair interpretation of the letters, that they import a concluded agreement; that if it rests reasonably doubtful, whether what passed was only treaty, let the progress towards the confines of agreement be more or less, the Court ought rather to leave the parties to law than specifically to perform what is doubtful as a contract": *Huddleston* v. *Briscoe*, 11 Ves. 583, 592.

To the same effect is the language of Lord Eldon in *Kennedy* v. *Lee*, 3 Mer. 441, 451, "The party seeking specific performance of such an agreement is bound to find in the correspondence, not merely a treaty—still less a proposal—for an agreement; but a treaty, with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance, which makes it no longer the act of one party, but of both . . . the same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument—the only difference between them being, that a letter or a correspondence is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion."

Treaty or contract.

The question which most frequently arises on the correspondence, and which is generally one of extreme difficulty, is whether there was at any time a concluded contract between the parties, or whether what passed between them was negotiation and no more.

A contract is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no *consensus*, what may have been written or said becomes immaterial: per Lord Westbury, L.C., *Chinnock* v. *M. of Ely*, 4 De G. J. & S. 638, 643. In considering the contents of a series of letters, this pro-

position should be carefully borne in mind—there must be in some part of the correspondence a clear accession on both sides to one and the same set of terms: *Thomas* v. *Blackman*, 1 Coll. 301.

A question for the jury.

The question whether a final binding agreement has been made between the parties, is a pure question of fact, to be decided by the jury, or the judge acting as a jury: *Ridgway* v. *Wharton*, 6 H. L. C. 238, see p. 295.

Tendency of modern decisions.

The tendency of modern decisions is to apply greater strictness to the construction of a series of letters than was formerly done. Thus it has been asserted by James, L.J., that "the Court has gone quite far enough in decreeing specific performance upon letters as constituting agreements, where one side is bound and the other not": *Nesham* v. *Selby*, L. R. 7 Ch. 406, 408; and again "for my own part, I have often felt that in cases of this nature, parties have found themselves entrapped into contracts by letters which they wrote, without the slightest idea that they were contracting": *Rossiter* v. *Miller*, 5 Ch. D. 648, 658. Jessel, M.R., has also said, "I think the decisions of our Courts as to letters have gone quite far enough, that is, in the spelling out of a contract from letters when both parties intended a formal contract to be executed": *May* v. *Thomson*, 20 Ch. D. 705, 716.

It is, in each case, a question to be decided on the special facts and surrounding circumstances, whether or not a concluded agreement has been made between the parties. The difficulty is not one of principle but of fact, and the numerous decisions give but little assistance towards arriving at a conclusion on a new state of facts. Their principal value, from this point of view, consists in the illustrations which they afford of the manner in which the Courts have dealt with the problem; and for this purpose the following cases may be usefully consulted:—

Concluded agreement.

1. Where the contract has been held to be complete: *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Kennedy* v. *Lee*, *Ibid.* 441; *Huddleston* v. *Briscoe*, 11 Ves. 583; *Clive* v. *Beaumont*, 1 De G. & Sm. 397; *Gibbins* v. *Met. Asylum District*, 11 Beav. 1; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70; *Rossiter* v. *Miller*, 3 App. Cas. 1124.

Chap. II. s. 9.

Negotiation not contract.

2. Where the contract has been held not to be complete: *Stratford* v. *Bosworth*, 2 V. & B. 341; *Thomas* v. *Blackman*, 1 Coll. 301; *Honeyman* v. *Marryat*, 21 Beav. 14; *Ridgway* v. *Wharton*, 6 H. L. C. 238 (see, however, the observations of Lord St. Leonards at p. 284); *Rummens* v. *Robins*, 3 De G. J. & S. 88; *Chinnock* v. *Marchioness of Ely*, 4 De G. J. & S. 638; *Nesham* v. *Selby*, L. R. 13 Eq. 191; 7 Ch. 406; *Stanley* v. *Dowdeswell*, L. R. 10 C. P. 102; *Hussey* v. *Horne-Payne*, 4 App. Cas. 311; *May* v. *Thomson*, 20 Ch. D. 705; *Williams* v. *Brisco*, 22 Ch. D. 441.

Sect. 10.—*Reference to a Formal Agreement.*

Reference to "formal agreement."

The question has been frequently raised whether a stipulation that a formal agreement shall be prepared, suspends a contract which would otherwise be considered complete, and prevents the parties from being bound until they have executed the formal instrument.

"It must not be supposed, because persons wish to have a formal agreement drawn up, that, therefore, they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that the parties do intend a subsequent agreement to be made, is strong evidence to show that they did not intend the previous negotiations to amount to an agreement": per Cranworth, L.C., *Ridgway* v. *Wharton*, 6 H. L. C. 238, 268. See the remarks of Lord St. Leonards at p. 288, and of Lord Wensleydale at p. 307, and also *Brogden* v. *Met. Ry. Co.*, 2 App. Cas. 666, 672; *Rossiter* v. *Miller*, 3 App. Cas. 1124, at p. 1151.

It is well established that an agreement even of the most informal character is binding, although the parties declare that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties: *Chinnock* v. *Marchioness of Ely*, 4 De G. J. & S. 638.

But if to a proposal or offer, an assent be given subject to a provision as to a contract, then the stipulation as to the contract

is a term of the assent, and there is no agreement independent of that stipulation: *Ibid.*

Agreement subject to formal contract being drawn up.

The distinction therefore is important between an agreement *subject to* the preparation of a formal contract, and an agreement in which that provision is itself only one of the terms. In the former case there is a condition precedent to the existence of any binding bargain, and specific performance cannot be enforced unless that condition is satisfied. See *Honeyman* v. *Marryat*, 21 Beav. 14; *Heyworth* v. *Knight*, 33 L. J. C. P. 298; *Winn* v. *Bull*, 7 Ch. D. 29; *Harvey* v. *Barnard's Inn*, 29 W. R. 922; *May* v. *Thomson*, 20 Ch. D. 705. Hawkesworth v. Chaffey W.N. 85 p. 2.

The doctrine that the reference to a formal contract does not prevent an informal memorandum from being binding, has been severely commented on by James, L.J., in *Smith* v. *Webster*, 3 Ch. D. 49. "It is much to be wished that some of the cases on that head could come before an authority competent to overrule them. On several occasions parties have found themselves entrapped into a binding contract when they never considered themselves to have entered into any agreement, but thought they were only settling one term of the contract—the price": at p. 56.

Terms agreed on to be put in legal form.

On the other hand, if the reference to a formal contract is only an incidental stipulation, specific performance will be ordered. See *Fowle* v. *Freeman*, 9 Ves. 351; *Oxford* v. *Provand*, L. R. 2 P. C. 135; *Rossiter* v. *Miller*, 3 App. Cas. 1124; *Eadie* v. *Addison*, 31 W. R. 320.

Approval of title by solicitor.

It seems that a stipulation in a written agreement that the title shall be approved by the purchaser's solicitor does not leave the purchaser at liberty, through the medium of his solicitor, capriciously to reject the title; but means nothing more than that the title is to be investigated and approved in the usual way: *Hussey* v. *Horne-Payne*, 4 App. Cas. 311, disapproving the ground of decision in the Court of Appeal, 8 Ch. D. 670, and the case there followed of *Hudson* v. *Buck*, 7 Ch. D. 683. But a stipulation that the terms of the lease should be "reasonable in our estimation," is more than a formal reservation of the lessee's right to object to unusual covenants, and must be complied with before there is any binding contract: *Wilcox* v. *Redhead*, 28 W. R. 795.

Sect. 11.—*Incorporation of Documents.*

Agreement may consist of several writings.

There is no necessity that the agreement of the parties should be contained in a single document. It is sufficient if all the material terms can be collected from several letters, or other writings, provided that all such writings are so connected as to form in reality one contract. See *Rossiter* v. *Miller*, 3 App. Cas. 1124, at p. 1143. The circumstances under which documents may be thus read together must now be considered. Lord Denman, C.J., referring to the incorporation of conditions of sale in a memorandum, said :—" The cases on this subject are not at first sight uniform ; but, on examination, it will be found that they establish this principle, that when a contract in writing or note exists which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them " : *Dobell* v. *Hutchinson*, 3 Ad. & E. 355, 371.

The cases indeed " establish this principle " independently of whether the other party is bound or not. If, for example, the terms of a contract are reduced into writing but not signed, any letter by either party referring to the unsigned document may, by supplying his signature, complete the efficacy of the agreement so far as he is concerned, although the other party may remain free : see Sug. V. & P. 137, 146.

But if the letter, instead of adopting, repudiates the terms of the unsigned agreement, there is no contract : *Gosbell* v. *Archer*, 2 Ad. & El. 500 ; *Archer* v. *Baynes*, 5 Exch. 625 ; *Richards* v. *Porter*, 6 B. & C. 437 ; *Cooper* v. *Smith*, 15 East, 103 ; *Goodman* v. *Griffiths*, 1 H. & N. 574. See, however, *Bailey* v. *Sweeting*, 9 C. B. N. S. 843.

What documents may be incorporated.

Any instrument capable of being identified may be incorporated by a subsequent signed document. Thus particulars and conditions of sale (*Higginson* v. *Clowes*, 15 Ves. 516 ; *Rossiter* v. *Miller*, 3 App. Cas. 1124), written instructions to a solicitor to enable him to prepare a formal agreement (*Ridgway* v. *Wharton*, 6 H. L. C. 238), a surveyor's report (*Baumann* v. *James*, L. R. 3 Ch. 508), title deeds (*Owen* v. *Thomas*, 3 My. & K. 353),

plans (*Hodges* v. *Horsfall*, 1 R. & M. 116; *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1), a deed (*Macrory* v. *Scott*, 5 Exch. 907), in fact, any existing document may be adopted and incorporated as expressing the terms of the contract or some of them. A series of letters passing between the parties may of course be read together: *Hussey* v. *Horne-Payne*, 4 App. Cas. 311; and each letter will be read in juxtaposition to, and in continuation of, the letter to which it is an answer: *Rossiter* v. *Miller*, 3 App. Cas. 1124, 1136.

A telegram, if properly identified, seems to be equivalent to a letter: *Coupland* v. *Arrowsmith*, 18 L. T. 755. See also the following cases in which a contract was extracted from a series of letters, *Kennedy* v. *Lee*, 3 Mer. 441; *Skinner* v. *M'Douall*, 2 De G. & S. 265; *Wood* v. *Scarth*, 2 K. & J. 33. In *Hamilton* v. *Terry* (11 C. B. 954), the correspondence was held not to constitute an agreement.

Two letters or other documents may, if both are signed by the defendant, be read together, although neither refers to the other: *Verlander* v. *Codd*, T. & R. 352. And see *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1.

Reference to incorporated document.

The document which incorporates must refer to that which is incorporated, and parol evidence is then admissible to prove the identity of the latter. The principle is thus stated by Lord Redesdale: "If the agreement had referred to the advertisement, I agree parol evidence might have been admitted to show what was the thing (namely, the advertisement) so referred to; for then it would be an agreement to grant for so much time as was expressed in the advertisement, and then the identity of the advertisement might be proved by parol evidence": *Clinan* v. *Cooke*, 1 Sch. & Lef. 22, 33. See *Studds* v. *Watson*, 28 Ch. D. 305.

Express reference and identification.

If a written document were referred to as an exhibit, "the document now produced and shown to me, and marked with the letter A," there could be no question that it was duly incorporated. The cases, however, show that no such express reference is required, and the modern tendency seems to be in the direction of allowing parol evidence when the reference to another document is of a somewhat vague description.

Ch. II. s. 11.

Express reference explained by parol evidence.

Thus a reference to "instructions," which might of course be by parol or in writing, has been decided to let in parol evidence to prove that instructions had been given in writing, and that there had been no other instructions than the written document which was produced: *Ridgway* v. *Wharton*, 6 H. L. C. 238.

So an acceptance of an offer "at the rent and terms agreed upon," has been held to make parol evidence admissible for the purpose of identifying a surveyor's report as containing "the rent and terms agreed upon": *Baumann* v. *James*, L. R. 3 Ch. 508.

Where the plaintiff had signed a memorandum containing the particulars of the contract, a subsequent letter from the defendant to the plaintiff referring to "our arrangement for the hire of your carriage," was decided to amount to an incorporation of the memorandum: *Cave* v. *Hastings*, 7 Q. B. D. 125. See also *Alcock* v. *Delay*, 4 El. & B. 660.

Inferential reference.

The Courts, however, seem to have gone further than this, and to have regarded the documents as sufficiently connected if they clearly related to the same transaction.

So where the time of payment (*Allen* v. *Bennet*, 3 Taunt. 169) or the subject matter (*Long* v. *Millar*, 4 C. P. D. 450; *Shardlow* v. *Cotterell*, 20 Ch. D. 90) are the same in both documents, they are connected by that circumstance, and may be read together.

By indorsement.

If an agreement is written upon the conditions of sale they seem to be incorporated, even without express reference: *Warner* v. *Willington*, 3 Drew. 523, 530; and see *Higginson* v. *Clowes*, 15 Ves. 516, where, however, there was an express incorporation of the conditions.

See further as to what is a sufficient reference: *Western* v. *Russell*, 3 V. & B. 187; *Jackson* v. *Lowe*, 1 Bing. 9; *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314; *Studds* v. *Watson*, 28 Ch. D. 305; and as to what is not a sufficient reference: *Boydell* v. *Drummond*, 11 East, 142; *Jacob* v. *Kirk*, 2 Moo. & R. 221; *Skelton* v. *Cole*, 1 De G. & J. 587; *Jackson* v. *Oglander*, 2 H. & M. 465; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Rishton* v. *Whatmore*, 8 Ch. D. 467.

d. Upham v. Dunn 24 ch D. 589.

Any term supplied.

Any term of the contract may be supplied by the incorporation of a document which contains the necessary information.

Thus the names of the vendor and purchaser, the particulars of the property, and the price, have been in the cases referred to furnished by the incorporated document.

General principle of construction.

Whether an unsigned document is incorporated in a signed letter, or correspondence is relied upon to supply some necessary term not contained in the original agreement, or all the terms of the contract have to be extracted from a series of letters, the principle of construction seems to be the same, viz., that, assuming the documents to be incorporated, they must be read and construed together, as if they were all written on the same sheet of paper and identified by the signatures of the parties.

CHAPTER III.

PARTICULARS AND CONDITIONS OF SALE.

SECT.		PAGE
1.	*Preparation of particulars and conditions.*	66
2.	*Description of the property*	67
3.	*Plan of the property*	72
4.	*The biddings*	73
5.	*Fixtures and timber*	74
6.	*Delivery of abstract*	75
7.	*Time for requisitions*	76
8.	*Rescission of contract*	77
9.	*Commencement of title*	79
10.	*Special conditions as to title*	81
11.	*Recitals to be evidence*	83
12.	*Receipt for rent to be evidence*	84
13.	*Identity of property*	86
14.	*Rights of way and easements*	87
15.	*Land for building*	88
16.	*Apportionment of rents*	90
17.	*Indemnity by purchaser of lease*	91
18.	*Expenses of proving title*	92
19.	*Deeds*	92
20.	*Compensation*	93
21.	*Completion of purchase*	95
22.	*Resale. Forfeiture of deposit*	97

SECT. 1.—*Preparation of Particulars and Conditions.*

Preparation.

THE proper office of the particulars is to describe the subject-matter of the contract, that of the conditions to state the terms on which it is sold: per V.-C. Malins, *Torrance* v. *Bolton*, L. R. 14 Eq. 124, 130; affirmed, L. R. 8 Ch. 118.

The conditions, as well as the particulars of sale, should be ready for intending purchasers in good time before the auction: *Ibid.*

Construed in favour of purchaser.

They should be expressed in terms the most clear and unambiguous, and if there is any chance of reasonable misapprehension they will be construed in favour of the purchaser: *Symons* v. *James*, 1 Y. & C. C. 487; *Seaton* v. *Mapp*, 2 Coll. 556; *Hoy* v. *Smythies*, 22 Bea. 510; *Greaves* v. *Wilson*, 25 Beav. 290; *Swaisland* v. *Dearsley*, 29 Beav. 430. This rule in favour of the purchaser applies as much to sales by the Court as to sales out of Court: *Dimmock* v. *Hallett*, L. R. 2 Ch. 21; *In re Banister*, 12 Ch. D. 131.

It has, however, been laid down by Lord Westbury, L. C., in *Cordingley* v. *Cheeseborough* (4 De G. F. & J. 379, 384), that this rule of construction only applies where the vendor is seeking specific performance, and that when the purchaser insists upon the benefit of a term in the contract giving him a right to deduction from his purchase-money, the ordinary rules of construction prevail.

Sect. 2.—*Description of the Property.*

Construed as including all vendor's interest.

The particulars, unless expressly limited, will be construed as including the whole of the vendor's interest in the premises (*Bower* v. *Cooper*, 2 Hare, 408), and in the absence of any explanation the contract will import a sale of the fee-simple: *Hughes* v. *Parker*, 8 M. & W. 244; *Worthington* v. *Warrington*, 5 C. B. at p. 644.

Verbal corrections by auctioneer.

A misstatement in the particulars is not cured by a verbal correction in favour of the vendor made by the auctioneer at the time of sale: *Jones* v. *Edney*, 3 Camp. 285; and see *Powell* v. *Edmunds*, 12 East, 6; *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Flight* v. *Booth*, 1 Bing. N. C. 370.

The auctioneer should correct the copy, and call the purchaser's attention to the correction before signature: *Manser* v. *Back*, 6 Hare, 443. It has been intimated that a statement by the auctioneer in favour of the purchaser is admissible in evidence against the vendor, even though made without authority and incorrect: *Brett* v. *Clowser*, 5 C. P. D. 376.

Correction in second edition.

Where a copy of particulars marked "first edition," and with no conditions annexed, was followed by a second edition, a purchaser was held bound by notice of the contents of the second edition, because it was his own fault that he had not obtained a copy: *Goddard* v. *Jeffreys*, 30 W. R. 269.

Tenure.

Freehold or copyhold.

The particulars should state whether the property is freehold, copyhold, or leasehold. If it is described as copyhold, and turns out to be freehold, the purchaser will not be compelled to complete the contract: *Ayles* v. *Cox*, 16 Beav. 23. *A fortiori* where it is described as freehold, and turns out to be copyhold: *Hart* v. *Swaine*, 7 Ch. D. 42; unless the copyhold tenure is

Chap. III. s. 2.

such as hardly to differ from that of freehold: *Price* v. *Macaulay*, 2 De G. M. & G. 339.

Lease or underlease.

The purchaser will not be compelled to complete if land described as leasehold turns out to be held under an underlease: *Madeley* v. *Booth*, 2 De G. & S. 718; *Hayford* v. *Criddle*, 22 Beav. 477. But if the particulars and conditions of sale are sufficient to give notice to the purchaser that he is buying an underlease, he will be compelled to complete: *Camberwell Building Society* v. *Holloway*, 13 Ch. D. 754, where Jessel, M. R., said, p. 769, that he entirely dissented from *Madeley* v. *Booth*. See also *Bartlett* v. *Salmon*, 6 De G. M. & G. 33.

Disapproved: re Beyfus & Masters 39 ch D. 110.

Sale of part of leaseholds comprised in one lease.

Where leasehold property contracted to be sold was found to be part only of the hereditaments comprised in the original lease, which contained a power of re-entry for breach of any of the covenants, it was held, although the original lease contained provisions for the apportionment of the rent and of the power of re-entry, that the facts should have been stated in the particulars, and expressly provided for by the conditions of sale, to enable the Court to enforce the contract: *Darlington* v. *Hamilton*, Kay, 550; *Blake* v. *Phinn*, 3 C. B. 976; *Warren* v. *Richardson*, You. 1; *Barnwell* v. *Harris*, 1 Taunt. 430. The purchaser is not bound to accept an indemnity: *Fildes* v. *Hooker*, 3 Mad. 193; and see *Paterson* v. *Long*, 6 Beav. 590.

Cresswell v. Davidson W.N. '87 p. 87.

Tenancies.

It is usual in the particulars either to state that the purchaser can have immediate possession, or, where the property is in the occupation of tenants, to mention the terms of the tenancies. Although as between the tenant and the purchaser the possession of the former is notice to the latter of the actual interest he may have (*Daniels* v. *Davison*, 16 Ves. 249, and see *post*, p. 320), yet as between the vendor and the purchaser it may be taken as now settled that a person who wants to buy property, and has notice of the occupation of a tenant, is not bound to inquire of the tenant what is the nature of his tenancy: per James, L. J., *Caballero* v. *Henty*, L. R. 9 Ch. 447. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser: *Ibid.* 450. This case overrules some of the *dicta* in *James* v. *Lichfield*, L. R. 9 Eq. 51. See also *Ridgway* v. *Gray*, 1 Mac. & G. 109; *Hughes* v.

Jones, 3 De G. F. & J. 307; *Phillips* v. *Miller*, L. R. 10 C. P. 420.

Land tax. Tithes.

It is not necessary to state that land is subject to burdens to which all land is *primâ facie* subject. Thus, land tax or tithe need not be mentioned, but if the land is incorrectly stated to be tithe free, the Court will not compel the purchaser to perform the contract on terms of compensation: *Binks* v. *Lord Rokeby*, 2 Sw. 222. In this case, however, under the special circumstances, specific performance, with compensation, was decreed: and see *Howland* v. *Norris*, 1 Cox, 59. A description of land as an estate in the Isle of Ely, consisting of fen land, was considered sufficient notice to a purchaser of liability to embanking and drainage taxes under a local but public Act of Parliament: *Barraud* v. *Archer*, 2 Sim. 433; affirmed, 2 Russ. & Myl. 751.

Fines on copyholds.

On a sale of copyholds it is usual to state the nature or amount of the fines and incidents, though it is not necessary to do so: see *Hayford* v. *Criddle*, 22 Beav. 477, 480; and care should be taken that there is no misdescription in the statement: *White* v. *Cuddon*, 8 Cl. & Fin. 766.

Covenants in a lease.

On a sale of leaseholds the vendor need not state that the lease contains covenants and restrictions, even though they are unusual or stringent: *Hall* v. *Smith*, 14 Ves. 426; *Paterson* v. *Long*, 6 Beav. 590; *Lewis* v. *Bond*, 18 Beav. 85; because it is the duty of the purchaser to inquire into the original lease: *Pope* v. *Garland*, 4 Y. & C. Ex. 394. A copy of the lease should therefore be produced at the sale, or an opportunity given to intending purchasers to inspect it previously.

If, however, the vendor of leaseholds takes upon himself to describe the nature and conditions of the lease under which he holds, he puts the purchaser off inquiry, and disentitles himself to specific performance if the description proves to be incorrect: see *Flight* v. *Booth*, 1 Bing. N. C. 370, where the particulars stated that "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter," and the lease prohibited the businesses of brewer, baker, poulterer, fruiterer, and many others: see also *Van* v. *Corpe*, 3 My. & K. 269; *Flight* v. *Barton*, 3 My. & K. 282; *Bentley* v.

Chap. III. s. 2.

Craven, 17 Beav. 204; *Stanley* v. *McGauran*, 11 L. R. Ir. 314.

So, where a public-house held under a lease requiring the lessee to take his beer from a particular brewer, was described as a "free public-house," the purchaser was not compelled to complete: *Jones* v. *Edney*, 3 Camp. 285.

Usual covenants.

If a lease is described as containing only the usual covenants and provisions, a purchaser relying on this statement will not be compelled to complete if the Court is of opinion that any of the covenants are not usual. Usual covenants and provisions have been held to be a covenant by the tenant to pay land-tax and all other taxes: *Bennett* v. *Womack*, 7 B. & C. 627; a proviso in a lease of a public-house for re-entry if any business other than that of a victualler should be carried on there: *Ibid.*; in a lease of a house a covenant to repair damage by fire: *Kendall* v. *Hill*, 6 Jur. N. S. 968; in a lease of a farm, a covenant not to mow meadow land more than once a year: *Hyde* v. *Warden*, 3 Ex. D. 72.

Unusual covenants.

Unusual covenants and provisions have been held to be a covenant against alienation: *Buckland* v. *Papillon*, L. R. 1 Eq. 477; affirmed, 2 Ch. 67; *Hampshire* v. *Wickens*, 7 Ch. D. 555, disapproving *Haines* v. *Burnett*, 27 Beav. 500; a power of re-entry on the bankruptcy of the lessee: *Hyde* v. *Warden*, 3 Ex. D. 72; or on the breach of any of his covenants except for non-payment of rent: *Hodgkinson* v. *Crowe*, L. R. 10 Ch. 622; a provision in a lease of a mine enabling the lessee to determine the lease when he can no longer work at a profit: *Strelley* v. *Pearson*, 15 Ch. D. 113; a provision that every assignment should be left with the lessor for registration with a fee of one guinea: *Brookes* v. *Drysdale*, 3 C. P. D. 52; a covenant in restraint of trade: *Wilbraham* v. *Livesey*, 18 Beav. 206.

Mortgages and other incumbrances.

Wherever the property is sold subject to any incumbrance, *e. g.* a mortgage (*Torrance* v. *Bolton*, L. R. 14 Eq. 124, 8 Ch. 118), a charge for portions (*Emery* v. *Grocock*, 6 Mad. 54), restrictive covenants (*Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159), rent-charges or quit rents (*Esdaile* v. *Stephenson*, 1 Sim. & St. 122), leases (*Hughes* v. *Jones*, 3 De G. F. & J. 307; *Phillips* v. *Miller*, L. R. 10 C. P. 420), the fact should be stated in the particulars. And see *Forteblow* v. *Shirley*, 2 Sw. 223; *Seaman*

v. *Vawdrey*, 16 Ves. 390; *Brandling* v. *Plummer*, 2 Drew. 427.

Easements.

If the purchaser will not be entitled on completion to the exclusive use of the property, by reason of some right or easement in favour of third persons not apparent from the state or nature of the property, or by reason of any latent defect, the particulars or conditions must give clear notice to that effect: *Heywood* v. *Mallalieu*, 25 Ch. D. 357.

Right of way or water.

A right of way over land put up for sale should be referred to in the particulars. Thus, where land described in the particulars as fit for building turned out to be subject to easements for supplying neighbouring lands with water from springs on the land contracted to be sold, with liberty of ingress and egress through the same land to and from the neighbouring lands, the purchaser was not compelled to complete: *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609. See also *Dykes* v. *Blake*, 4 Bing. N. C. 463; *A.-G.* v. *Biphosphated Guano Co.*, 11 Ch. D. 327; *Goodhart* v. *Hyett*, 25 Ch. D. 182. If, however, the right of way is obvious and the purchaser must have known of it he will be compelled to complete: *Bowles* v. *Round*, 5 Ves. 508.

Minerals.

On a sale of freeholds, if minerals are not to be included, they must be reserved (*Hayford* v. *Criddle*, 22 Beav. 480; *Upperton* v. *Nickolson*, L. R. 6 Ch. 436), unless the sale is to a railway company (8 & 9 Vict. c. 20, s. 77), or to a waterworks company (10 Vict. c. 17, s. 18), in which cases the Acts provide that the minerals shall not pass unless expressly included. See *Loosemore* v. *Tiverton & North Devon Railway Co.*, 22 Ch. D. 25. As to the meaning of the word "minerals," see *post*, p. 292.

Minerals in copyholds.

In copyhold lands the property in the minerals is in the lord, but the possession is in the copyholder: *Keyse* v. *Powell*, 2 E. & B. 132; *Lewis* v. *Branthwaite*, 2 B. & Ad. 437; and so with timber: *Ibid.*; on a sale, therefore, of land described as copyhold it is not necessary to state that the minerals will not be included: *Hayford* v. *Criddle*, 22 Beav. 480. As to the respective rights of the lord of the manor and the copyholder in the working of minerals, see *Bowser* v. *Maclean*, 2 De G. F. & J. 415; *Eardley* v. *Granville*, 3 Ch. D. 826; *A.-G.* v. *Tomline*, 5 Ch. D. 750.

Chap. III. s. 2.

Turbary. If a liberty of turbary is reserved it should be so stated in the particulars: *Martin* v. *Cotter*, 3 J. & L. 496; or a right of

Sporting. sporting: *Burnell* v. *Brown*, 1 Jac. & W. 168.

Light. Since the vendor cannot derogate from his own grant he will not be allowed to obstruct the access of light to the purchaser's windows, unless he has expressly reserved such right: *Palmer* v. *Fletcher*, 1 Lev. 122; *Compton* v. *Richards*, 1 Pri. 27; *Swansborough* v. *Coventry*, 9 Bing. 305. But this rule does not apply to new windows opened by the purchaser: *Blanchard* v. *Bridges*, 4 A. & E. 176; nor where the adjoining land is acquired by the vendor after his conveyance to the purchaser: *Booth* v. *Alcock*, L. R. 8 Ch. 663.

Usque ad cœlum. Generally wherever the vendor wishes to retain any rights over the property which would interfere with the purchaser's right to exclusive enjoyment of the land *usque ad cœlum*, such rights must be expressly reserved: *Martyr* v. *Lawrence*, 2 De G. J. & S. 261; *Corbett* v. *Hill*, L. R. 9 Eq. 671. See also *Kerslake* v. *White*, 2 Stark. 508.

Sect. 3.—*Plan of the Property.*

Sale plan. Where a sale plan accurately delineates the property, it is merely equivalent to a view of the property. Thus, where the sale plan showed a line of pipes leading from a reservoir to a house, and the land on which the reservoir stood was put up for sale in one lot, and the house in another lot, it was held that the exhibition of the plan did not amount to a representation that the purchaser of the house would be entitled to water from the reservoir: *Fewster* v. *Turner*, 6 Jur. 144. So a plan showing two private ways over the vendor's other property to the particular lot sold does not of itself entitle the purchaser to more than one right of way: *Bolton* v. *Bolton*, 11 Ch. D. 968. But in *Nicholson* v. *Rose* (4 De G. & J. 10), where a lease was granted with the control of a plantation shown on a plan, but not part of the demised premises, the Lords Justices held that upon construction of the lease as explained by the plan the lessee

was entitled to restrain the lessor from cutting down the plantation.

Plan must be correct.

The vendor is responsible for the correctness of the plan, and it should be framed so as to convey clear information to the purchaser: *Dykes* v. *Blake*, 4 Bing. N. C. 463; in which case the plan disclosed a carriage way in front, and a footway at the back, but not a footway through one of the lots, and the purchaser was therefore released from his bargain. See also *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 Ch. D. 327.

Rights of way must be shown.

Boundaries must be shown.

In *Denny* v. *Hancock* (L. R. 6 Ch. 1), a purchaser who had gone over the property with the sale plan was held entitled to rescind, on the ground that there was nothing in the plan or particulars to inform him that an apparent boundary made by an iron fence running along close by the side of the property, as shown on the plan, was not the true boundary, which was denoted by stumps almost concealed among shrubs. See also *Baskcomb* v. *Beckwith*, L. R. 8 Eq. 100; *Re Arnold*, 14 Ch. D. 270.

On the other hand, where a purchaser had inspected the property, and saw a yard used with and apparently part of the premises, and had bid at the auction believing such yard to be included in the sale, he was held bound to his bargain, because the sale plan showed clearly that such yard was not included; nor did it make any difference that as a fact he had not looked at the plan: *Tamplin* v. *James*, 15 Ch. D. 215.

Sect. 4.—*The Biddings.*

30 & 31 Vict. c. 48, s. 5.

The Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48, s. 5), enacts that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserve price, or whether a right to bid is reserved.

Sect. 7.

By sect. 7 of the same Act it is enacted that the practice of opening biddings by order of the Court of Chancery be discontinued, except on the ground of fraud.

Right to bid.

Where the conditions state that the property is put up to

Chap. III. s. 4.

auction subject to a reserved bidding, the right to employ a person to bid up to the reserved price must be expressly stipulated for: *Gilliat* v. *Gilliat*, L. R. 9 Eq. 60.

Bidding retracted.

A bidder at an auction may retract his bidding at any time before the hammer is down: *Payne* v. *Cave*, 3 T. R. 148. It is usual to provide in the conditions that a purchaser shall not retract his bidding, but such a condition is of doubtful force. See Sug. V. & P. 14; *Freer* v. *Rimner*, 14 Sim. 391.

Withdrawal of lots.

Where the property is sold in lots the conditions should provide that all or any of the lots may be withdrawn without declaring the reserve price.

Sect. 5.—*Fixtures and Timber.*

If it is intended that the purchaser shall pay for the fixtures or timber in addition to the amount of his bidding, it should be so provided by the conditions.

Fixtures.

Fixtures are things which are ordinarily affixed to the freehold for the convenience of the occupier, and which may be removed without material injury to the freehold, and the removal of which by a tenant would not give a ground of action to the landlord: *Ex parte Barclay*, 5 De G. M. & G. 403; see also *Elwes* v. *Maw*, 3 East, 38; Smith's L. C. vol. ii.; *Mather* v. *Fraser*, 2 K. & J. 536; *Ex parte Moore and Robinson's Banking Co.*, 14 Ch. D. 379.

Timber.

Timber by the general law of England means oak, ash and elm, of the age of twenty years and upwards. By the custom of the country it may include other trees, such as beech, hornbeam, and even white-thorn and black-thorn: *Honywood* v. *Honywood*, L. R. 18 Eq. 306.

Valuation by arbitrators.

The price for the fixtures and timber is usually ascertained by two valuers, one appointed by each side or by an umpire appointed by the valuers. It is important to provide by the condition that if either side fails to appoint a valuer, or his valuer neglects to act, the other valuer may fix a price which shall bind the defaulting side, for where the parties have stipulated that the price shall be ascertained in a particular way, and

it is not so ascertained, the Court will not interfere: *Milnes* v. *Gery*, 14 Ves. 400; *Morgan* v. *Milman*, 3 De G. M. & G. 24; *Vickers* v. *Vickers*, L. R. 4 Eq. 529; and see *ante*, p. 39.

Sect. 6.—*Delivery of Abstract.*

The vendor is bound, in the absence of any condition to the contrary, to furnish an abstract to the purchaser, who is not bound to wade through the deeds: Sug. V. & P. 406.

Delivery by fixed day.

The conditions sometimes provide that the abstract shall be sent to the purchaser by a certain day, from which his time for delivering requisitions begins to run. For this purpose the abstract must be a perfect abstract: *Hobson* v. *Bell*, 2 Beav. 17; *i. e.* a perfect abstract of such title as the vendor had at the time of delivering it: *Morley* v. *Cook*, 2 Hare, 106; *Blackburn* v. *Smith*, 2 Exch. 783.

On sale by Court.

Where property is sold under an order of the Court, the conditions of sale must specify a time for the delivery of the abstract: see Rules of the Supreme Court, 1883, Ord. LI. r. 2.

Advisable not to fix day.

In sales out of Court, unless the vendor is prepared beforehand to deliver his abstract, it is advisable not to fix a day, because, if a perfect abstract is not delivered by the day fixed, time will not begin to run against the purchaser: *Blacklow* v. *Laws*, 2 Hare, 40; *Want* v. *Stallibrass*, L. R. 8 Ex. 175.

Time for delivery waived.

The time for delivery of the abstract may be waived. Thus, where in a contract for sale it was stipulated that the abstract should be delivered immediately, and that in case the purchase should not be completed by a given day, the purchaser should be released from the contract, and the abstract was not delivered immediately, but communications on the subject of the title were continued until after the time for completion had expired, the purchaser was held to have waived the benefit of the stipulation as to time: *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401; and see 4 Y. & C. 566.

One abstract.

Under sect. 3, sub-s. 7, of the Conveyancing and Law of Property Act, 1881, a purchaser of two or more lots will not

Chap. III. s. 6.

have a right to more than one abstract of the common title, except at his own expense.

No abstract.

It is not unusual, where some lots are of very small value, to provide that the purchasers of those lots shall not be entitled to any abstract, except at their own expense; but that they may inspect the abstract at the office of the vendor's solicitors.

Sect. 7.—*Time for Requisitions.*

Time usually fixed.

It is usually provided that requisitions shall be sent in within a certain number of days from the receipt of the abstract, and further requisitions within a certain number of days from the receipt of the vendor's replies; and that, subject to requisitions so sent in, the purchaser shall be considered to have accepted the title, and that in that respect time shall be of the essence of the contract.

Vendor must deliver proper abstract.

The object of this provision is to enable the vendor to insist upon the purchaser completing within a reasonable time, but in order to avail himself of it he must have fulfilled strictly his part of the stipulation. Thus, if he does not deliver the abstract within the time stated he cannot insist upon time being of the essence of the contract with respect to the purchaser's requisitions: *Southby* v. *Hutt*, 2 My. & C. 207, 211; and the abstract must be a perfect abstract: see *ante*, p. 75.

Time may be waived.

Where the time for delivering requisitions had gone by, but the vendor received them and entered into a correspondence with the purchaser about them, he was held to have waived the benefit of the condition as to time: *Cutts* v. *Thodey*, 13 Sim. 206.

Objection which goes to root of title may be taken after time has expired.

In the recent case of *Re Tanqueray-Willaume and Landau* (20 Ch. D. 465), it was held that the purchaser was not prevented from taking an objection which went to the root of the vendors' title, and raised a doubt as to whether they had any power to sell, although the time limited by the conditions had expired: but see *Rosenberg* v. *Cook*, 8 Q. B. D. 162.

Further requisitions.

The condition should also limit the time within which further requisitions upon the vendor's replies should be sent in: see

Tanner v. *Smith*, 10 Sim. 410, 4 Jur. 310; *Morley* v. *Cook*, 2 Hare, 106.

Sect. 8.—*Rescission of Contract.*

By the conditions it is usually also provided that if any requisition shall be insisted upon by the purchaser which the vendor shall be unable or unwilling to remove, he shall be at liberty, notwithstanding any previous negotiation, to rescind the sale.

Arbitrary rescission.

But the vendor will not be allowed to avail himself of this provision at his own pleasure. It has been held that such a condition ought to be discouraged by putting a strict construction upon it in favour of the purchaser, who ought not to be put to great expense and inconvenience at the mere will of the vendor: *Morley* v. *Cook*, 2 Hare, 106.

"Unwilling."

The word "unwilling" is not to be considered as giving an arbitrary power to the vendor to annul the contract; he must show some reasonable grounds for unwillingness: per Turner, L. J., *Duddell* v. *Simpson*, L. R. 2 Ch. 102, 107; and see *Gray* v. *Fowler*, L. R. 8 Ex. 249, 265.

Where vendor has no title at all.

Such a condition will not enable the vendor to rescind where he puts up the property for sale knowing that he has no title at all: *Bowman* v. *Hyland*, 8 Ch. D. 588. Nor can the vendor rescind where he knows that he has not got the entire interest in the property: *Nelthorpe* v. *Holgate*, 1 Coll. 203; or where the sale is under a decree by the Court which is found to be invalid: *Powell* v. *Powell*, L. R. 19 Eq. 422.

To save trouble or expense.

Nor can the vendor avail himself of this condition in order to save the trouble of putting the purchaser in possession, as where on a sale by a mortgagee the mortgagor was found to be in possession, and refused to go out: *Engel* v. *Fitch*, L. R. 4 Q. B. 659; or in order to save himself the expense of getting in outstanding mortgages: *Greaves* v. *Wilson*, 25 Beav. 290; *In re Jackson and Oakshott*, 14 Ch. D. 851; or an outstanding legal estate: *Kitchen* v. *Palmer*, 46 L. J. Ch. 611.

To avoid compensation.

The vendor will not be allowed to rescind where the objection does not relate to his title, but is merely in respect of a misdescription of the property which can be properly dealt with

Chap. III. s. 8.

under the condition providing for compensation: *Painter* v. *Newby*, 11 Hare, 26; *Hoy* v. *Smythies*, 22 Beav. 510.

Lastly, the vendor cannot rescind under this condition, because he objects to the form of the conveyance tendered by the purchaser: *Re Monckton and Gilzean*, 27 Ch. D. 555.

Bonâ fide rescission.

The condition will enable the vendor to rescind where the objection is one as to title, and not merely as to a misdescription which might be the subject of compensation, and where to comply with the objection would involve a long and expensive inquiry: *Page* v. *Adam*, 4 Beav. 269; *Hoy* v. *Smythies*, 22 Beav. 510; *Mawson* v. *Fletcher*, L. R. 6 Ch. 91; *Re G. N. Ry. Co. and Sanderson*, 25 Ch. D. 788; or where the vendor without fault of his own is unable to make out a good title: *Duddell* v. *Simpson*, L. R. 2 Ch. 103; *Heppenstall* v. *Hose*, 33 W. R. 30; or where the purchaser is creating an unreasonable delay in carrying out the contract: *Hudson* v. *Temple*, 29 Beav. 536.

Rescission after action brought.

And he may rescind even after the purchaser has commenced an action for specific performance: *Hoy* v. *Smythies*, 22 Beav. 510; *Duddell* v. *Simpson*, L. R. 2 Ch. 102, 108; but not after he has himself commenced such an action, unless fresh objections to the title are subsequently raised by the purchaser: *Gray* v. *Fowler*, L. R. 8 Ex. 249; and see *Warde* v. *Dickson*, 28 L. J. Ch. 315.

Vendor must first answer requisitions.

It was formerly held that the vendor by answering the purchaser's requisitions, or by continuing the negotiation, waived the right to rescind: *Tanner* v. *Smith*, 10 Sim. 410; 4 Jur. 310. But it is now settled that a vendor cannot rescind without answering the purchaser's requisitions: *Turpin* v. *Chambers*, 29 Beav. 104, even though some of the requisitions are untenable; and he must give the purchaser an opportunity of waiving or insisting upon them: *Greaves* v. *Wilson*, 25 Beav. 290; and if the purchaser is willing to waive them the vendor cannot rescind: *Duddell* v. *Simpson*, L. R. 1 Eq. 578, 2 Ch. 102. See, however, *Re Dames and Wood*, 27 Ch. D. 172.

Repayment of deposit on rescission.

The conditions should further provide that upon rescission of the contract by the vendor the purchaser shall be repaid his deposit, but without interest, damages or costs. The vendor cannot, under cover of this condition, retain the deposit as long

as he pleases, while he makes fruitless efforts to remove the difficulty, and while the purchaser is pressing for the repayment of his money: *McCulloch* v. *Gregory*, 1 K. & J. 286.

Sect. 9.—*Commencement of Title.*

The conditions should state with what document the title shall commence. The Conveyancing Act, 1881, s. 3, sub-s. 3, precludes the purchaser from requiring the production of the earlier title, or making any requisition, objection or inquiry in respect of it. But the section has no greater effect than similar provisions contained in the contract: sub-s. 11.

Conveyancing Act, 1881, s. 3, sub-s. 3.

It is a question of some nicety how far a purchaser can be precluded from bringing forward a defect in the vendor's earlier title discovered *aliunde*. In considering this point it is unnecessary now to take into consideration the distinction which was made in some of the earlier cases, such as *Shepherd* v. *Keatley* (1 Cr. M. & R. 117), *Waddell* v. *Wolfe* (L. R. 9 Q. B. 515), between requisitions and objections, these being similarly treated by the above-mentioned section of the Conveyancing Act.

Defects in earlier title discovered *aliunde*.

It was laid down by Wood, V.-C., in *Darlington* v. *Hamilton* (Kay, 550), that "whatever be the terms of the condition of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist on the objection." This was apparently carrying the doctrine too far, and there can be no doubt that a purchaser can be precluded by a condition of sale from taking an objection discovered *aliunde*.

Such a condition will, however, be strictly construed: *Seaton* v. *Mapp*, 2 Coll. 556; *Nott* v. *Riccard*, 22 Beav. 307; and it has been held not to preclude the purchaser from inquiring into and taking objection to the earlier title in the following cases:—

When the purchaser may take objections discovered *aliunde*.

(1) Where the title as made out by the abstract shows an imperfect commencement, as on a sale of copyhold lands, where the title as shown depended on a surrender which had never been made: *Sellick* v. *Trevor*, 11 M. & W. 722. See *King* v. *Chamberlayne* 4 W. 97 p. 153.

(2) Where on a sale of leaseholds it appeared that the lease

Chap. III. s. 9.

was granted in pursuance of an agreement which had itself been mortgaged: *Rhodes* v. *Ibbetson*, 4 De G. M. & G. 787.

(3) Where on the sale of an underlease it appeared that the lessor, previous to granting the underlease, had mortgaged his lease: *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515.

(4) Where on the sale of freeholds the abstract showed that they were subject to covenants and conditions contained in an earlier deed, the purchaser being entitled in the absence of express stipulation to have an unencumbered freehold title: *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159.

(5) Where the vendor himself accidentally disclosed the defect in his title: *Smith* v. *Robinson*, 13 Ch. D. 148.

(6) Where the vendor and purchaser were both under a common mistake, as that the property belonged to the vendor when it really belonged to the purchaser: *Bingham* v. *Bingham*, 1 Ves. Sen. 126; *Jones* v. *Clifford*, 3 Ch. D. 779.

(7) Generally where the vendor has made any statement as to his title which is untrue: *Nash* v. *Wooderson*, 33 W. R. 301; or has concealed something which the purchaser ought to have had an opportunity of considering, as where a recital of the effect of a will was incorrect: *Else* v. *Else*, L. R. 13 Eq. 196 (in this case the sale was by the Court); or where the deed fixed for commencement of title was a voluntary deed with a power of revocation reserved to the grantor: *In re Marsh and Earl Granville*, 24 Ch. D. 11; or on a sale of leaseholds where the vendor mentioned one underlease which had been forfeited by the underlessee absconding, but concealed another underlease which was still existing, and required that no objection should be made in respect of the stated underlease or any underlease: *Edwards* v. *Wickwar*, L. R. 1 Eq. 68.

Where the conditions provide that the title shall commence at a certain date, and the vendor is unable to furnish a good title as from that date, the purchaser, if he insists on the completion of the contract, is not entitled to more than a good holding title: *Re Banister*, 12 Ch. D. 131; *Smith* v. *Robinson*, 13 Ch. D. 148.

Sect. 10.—*Special Conditions as to Title.*

In some cases it is necessary for the vendor not only to limit the title which is to be shown to the purchaser, but also to require him to assume the truth and accuracy of certain facts or results incidental to the making out of the title.

Bonâ fide doubts as to title.

This may be done where there is *bonâ fide* a doubt as to some link in the vendor's title, or where he desires to avoid the trouble and expense of procuring evidence in proof of his assertion.

Thus, where the document fixed for commencement of title is not a proper root of title, the purchaser should be required to make the necessary assumption, *e. g.* where the title commences with a will that the testator died seised (*Parr* v. *Lovegrove*, 4 Drew. 170), or where the first deed was executed in pursuance of a power contained in a document which had been lost that the power was properly exercised: *Prosser* v. *Watts*, 6 Mad. 59; *Doe* v. *Brooks*, 3 A. & E. 513; Sug. V. & P. 366, 437. See now, however, Conveyancing Act, 1881, s. 3, sub-s. 3.

Seisin of testator.

Lost document.

Where there is some doubt as to the due execution of a deed, the purchaser should be precluded from making any objection on that account: *Corrall* v. *Cattell*, 4 M. & W. 734; 3 Y. & C. Ex. 413.

Execution of a deed.

On a sale of leaseholds by the executrix of a surviving trustee, the purchaser was required to assume the assent of the executors of the testator to the bequest of the leaseholds to the trustees: *Jackson* v. *Whitehead*, 28 Beav. 154.

Assent of executors.

On a sale by order of the Court in an administration action, the purchaser was precluded from making any objection on the ground of jurisdiction: *Nunn* v. *Hancock*, L. R. 6 Ch. 850.

Jurisdiction.

In the case of *Best* v. *Hamand* (12 Ch. D. 1), a person who had bought superfluous land from a railway company, was selling again under conditions of sale requiring that everything should be assumed to have been done by the company to enable them to sell. The purchaser from him discovered *aliunde* that the company had not offered the land to the original owners, who had never waived their right of pre-emption, and he thereupon refused to complete. It was held by the Court of Appeal,

Assumption as to facts.

Ch. III. s. 10.

reversing Hall, V.-C., that the purchaser could not recover his deposit. It appears from the report that the vendor had never ascertained whether the company were in a position to sell, and inserted the condition to guard against any doubt arising on this point. Had he been aware of the facts, or had the railway company attempted to sell under such a condition, the purchaser would not have been bound by the condition as requiring him to assume what the vendor knew to be false: see *Re Banister*, 12 Ch. D. 131.

Misleading conditions.

Erroneous statement of facts.

A purchaser cannot be required to assume what is based on an erroneous statement of fact, as that a testator was at the time of his death beneficially entitled to property in fee simple, when he had at the time of his death only contracted for the purchase of the property which could not be completed till long afterwards, owing to defects in the title: *Harnett* v. *Baker*, L. R., 20 Eq. 50.

Assumption which is known to be false.

In the case of *Re Banister* (12 Ch. D. 131), it was laid down by the Court of Appeal that where the facts are not fully set forth, a condition of sale is bad as misleading, if it requires the purchaser to assume what the vendor knows to be false, or if it states that the state of the title is not accurately known when in fact it is known to the vendor.

Known defects in title.

Even where some part of the title is known to be actually defective, the vendor can preclude the purchaser from taking the objection, but then he must fairly put him in possession of the facts. Thus, on a sale of an underlease, the purchaser was precluded from objecting that it had been made in excess of the superior lease: *Smith* v. *Watts*, 4 Drew. 338; so on a sale of real estate the purchaser was required by a condition to make no objection in respect of certain leases granted by trustees without power of leasing, the existence of which leases materially lessened the value of the property, and he was held bound by the condition: *Micholls* v. *Corbett*, 3 De G. J. & S. 18. In *Minet* v. *Leman* (7 De G. M. & G. 340), the purchaser, an experienced solicitor, was precluded from taking an objection arising from the construction of an Act of Parliament, which was considered to be sufficiently disclosed on the conditions.

Underlease in excess of lease.

Breach of trust.

Construction of Act of Parliament.

Conclusion of law.

But if a vendor sets out certain facts, and then states, not as a

conclusion of law from such facts but as a positive fact, that he has a power of sale, the purchaser can inquire into the question whether he has a power of sale or not: *Johnson* v. *Smiley*, 17 Beav. 223.

Facts stated as ground for condition must be proved.

And where the conditions of sale state certain facts as the ground for imposing certain terms upon the purchaser, the vendor can be required to prove his facts: *Symons* v. *James*, 1 Y. & C. C. 487; *Bird* v. *Fox*, 11 Hare, at p. 48; unless he expressly stipulates that no evidence shall be required.

Whatever title vendor has.

It is clear that the vendor can force the purchaser to accept his title, whatever it is, by condition, either stating that the title will not be shown, and shall not be inquired into (*Hume* v. *Bentley*, 5 De G. & S. 520; *Spratt* v. *Jeffery*, 5 Man. & Ry. 188), or requiring the acceptance of such title as he has: *Molloy* v. *Sterne*, 1 Dru. & Wal. 585; *Freme* v. *Wright*, 4 Mad. 364; *Wilmot* v. *Wilkinson*, 6 B. & C. 506; *Duke* v. *Barnett*, 2 Coll. 337; *Smith* v. *Capron*, 7 Ha. 185, 191; *Ashworth* v. *Mounsey*, 9 Exch. 175; *Hume* v. *Pocock*, L. R. 1 Ch. 379.

Such decisions have been considered rather a stretch of the jurisdiction of the Court, and they would not be followed if there was anything in the particulars or conditions which would be at all likely to mislead the purchaser: *Edwards* v. *Wickwar*, L. R. 1 Eq. 68. And see *Price* v. *Macaulay*, 2 De G. M. & G. at p. 344; *Re Cumming to Godbolt*, W. N. 1884, 204.

Sale of mere physical possession.

But in the recent case of *Rosenberg* v. *Cook* (8 Q. B. D. 162), it was held by the Court of Appeal that where the particulars gave sufficient notice that all that the vendor had to sell was a mere physical possession, the conveyance under which he held being void, the purchaser on declining to complete could not recover his deposit.

Sect. 11.—*Recitals to be Evidence.*

Convey-ancing Act, 1881. V. & P. Act, 1874.

With regard to recitals in deeds the Conveyancing Act, 1881, s. 3, sub-s. 3, requires the purchaser to assume, unless the contrary appears, that the recitals in the abstracted instruments of documents forming part of the prior title are correct. This subsection to some extent supplements sect. 2, sub-sect. 2 of the

Ch. III. s. 11.

Vendor and Purchaser Act, 1874, making recitals in instruments twenty years old sufficient evidence of the truth of the matters therein recited, except so far as they shall be proved to be inaccurate. See *Bolton* v. *London School Board*, 7 Ch. D. 766; *In re Marsh and Earl Granville*, 24 Ch. D. 11. The force of these sections is somewhat weakened by the qualifications enabling the purchaser to prove the contrary, and it is still usual to insert a condition that documents twenty years old shall be conclusive evidence of matters recited therein, or to be implied therefrom.

Inaccurate recitals.

It is doubtful, however, whether any condition can make recitals conclusive evidence where they are proved to be inaccurate. Thus it has been held, in spite of the condition, that a recital which states facts, and also a deduction from those facts, is not conclusive evidence of the correctness of the deduction: *Goold* v. *White*, Kay, 683; and where the vendor, while stipulating that a recital shall be sufficient evidence of particular facts, states those facts in a misleading manner, or conceals some of them, the purchaser will not be bound by the condition: *Drysdale* v. *Mace*, 5 De G. M. & G. 103.

Sect. 12.—*Receipt for Rent to be Evidence of Performance of Covenants in Lease.*

Conveyancing Act, 1881, s. 3, sub-ss. 4, 5.

The Conveyancing Act, 1881, s. 3, sub-sects. 4 and 5, provides that on the sale of leasehold property the purchaser shall assume, unless the contrary appears, that the lease or underlease, and every superior lease, were duly granted, and that, on production of the receipt for the last payment due for rent, he shall assume, unless the contrary appears, that the covenants of the lease or of the underlease and every superior lease have been performed up to the date of completion of the purchase.

This provision is much weakened by the insertion of the words "unless the contrary appears," for it is clear that if it appeared that a covenant, *e. g.*, to keep in repair or not to build, had been broken, the receipt for rent would not be sufficient evidence of the waiver of such breach. It is still usual to

insert a condition making the leases conclusive evidence of the title of the lessors to grant them, and the production of the receipt for the last rent due before completion conclusive evidence of the performance of the covenants or waiver of any breach up to the time of completion. The section does not apply to a peppercorn rent: *Re Moody and Yates' Contract*, 28 Ch. D. 661.

Receipt of rent waiver of forfeiture.

Receipt of rent is only a waiver of the breach of a covenant where such rent accrues upon or after the forfeiture (*Doe* v. *Rees*, 4 Bing. N. C. 384; *Doe* v. *Pritchard*, 5 B. & Ad. 765), and the breach is known to the lessor at the time of accepting the rent: *Bridges* v. *Longman*, 24 Beav. 27; *Croft* v. *Lumley*, 6 H. L. Cas. 672; *Walrond* v. *Hawkins*, L. R., 10 C. P. 342; but when the lessor knows of the breach he cannot receive the rent without prejudice to his right of forfeiture: *Davenport* v. *The Queen*, 3 App. Cas. 115.

Effect of condition.

It has been held that a condition that possession under the lease shall be conclusive evidence of performance of covenants or waiver of breach up to the completion of the sale will not avail where the vendor had incurred a forfeiture by the breach of a covenant to insure between the contract and the conveyance: *Howell* v. *Kightley*, 21 Beav. 331; but in *Bull* v. *Hutchens* (32 Beav. 615), a condition that the production of the last receipt for rent should be conclusive evidence of the performance of the covenants up to the completion of the purchase, was held to cover a breach of a covenant to keep in repair. And see *Havens* v. *Middleton*, 10 Hare, 641.

The vendor could not avail himself of such a condition where he had committed a breach involving forfeiture, and knew that the lessor was about to exercise his right to forfeit. In the case of *Lawrie* v. *Lees* (7 App. Cas. 19) the lessor not only waived but approved of the breach, and a decree for specific performance having been made and not appealed from, the only question before the Court was, whether a good title had been made in accordance with the contract (see p. 27); see also *Nouaille* v. *Flight*, 7 Beav. 521.

Relief against forfeiture.

Under the Conveyancing Act, 1881, s. 14 (repealing 22 & 23 Vict. c. 35, ss. 4—9, and 23 & 24 Vict. c. 126, s. 2), the Court has

Ch. III. s. 12.

power to relieve against forfeiture of leases for breach of certain covenants. It seems probable, therefore, that the Court would in such cases enforce specific performance of the purchase of a lease with compensation for the damages to be awarded under that section in lieu of forfeiture.

Sect. 13.—*Identity of Property.*

General rule.

As a general rule the purchaser is entitled to require proof that the descriptions in the deeds comprise the property sold;

Copyholds.

but on the sale of copyhold lands it is sufficient to prove that the property has been actually enjoyed and passed for a sufficient number of years under the descriptions on the rolls, although those descriptions are vague and general: *Long* v. *Collier*, 4 Russ. 267.

Different tenures distinguished.

Where lands of different tenures are sold together, the purchaser, in the absence of any stipulation, may be entitled to have the different kinds distinguished: *Munro* v. *Taylor*, 8 Hare, 51; 3 Mac. & G. 713; but slight circumstances will negative this right: *Ibid.*; *Dawson* v. *Brinckman*, 3 Mac. & G. 53. It is safer in such cases to provide that the vendor shall not be required to distinguish between lands of different tenures: *Crosse* v. *Lawrence*, 9 Hare, 462.

Difference in the descriptions.

A condition that the purchaser shall not require further evidence of identity than is afforded by the abstract, and the documents therein abstracted, is of no avail if the descriptions in the documents differ from each other, or from the particulars: *Flower* v. *Hartopp*, 6 Beav. 476; and though such a condition may preclude the purchaser from calling for further evidence, he cannot be forced to accept the title, unless the evidence is complete upon the deeds: *Curling* v. *Austin*, 2 Dr. & Sm. 129.

Difference between descriptions and the property.

But where the conditions expressly stated that the deeds and court rolls showed a smaller quantity than was stated in the particulars, and went on to provide that no other evidence of identity should be required than that furnished by the documents of title, and that the statements therein should be conclusive evidence of identity, the purchaser was held bound to complete

although the abstract showed title to a smaller quantity of land than the amount named in the particulars: *Nicoll* v. *Chambers*, 11 C. B. 996.

Statutory declaration.

A statutory declaration that the property has been held for so many years consistently with the title shown should be offered by the vendor, whenever the descriptions in the different deeds are not consistent with each other, or are difficult to identify with the property. And the purchaser should be precluded by condition from requiring any other proof of identity.

Sect. 14.—*Rights of Way and Easements.*

Protection against unimportant easements.

It is usual to declare that the property is sold subject to all chief, quit, and other rents, rights of way, and other rights and easements, if any, existing. The purpose of this condition is to protect the vendor from liability in case it should appear after the sale that the property sold is subject to some right or easement unknown to him: *Russell* v. *Harford*, L. R. 2 Eq. 507, at p. 512.

But not against easements which materially affect property.

But such a condition is no protection if the particulars and conditions have been so framed as to conceal the existence of an easement, which detracts considerably from the value of the property: *Heywood* v. *Mallalieu*, 25 Ch. D. 357. And see *Dykes* v. *Blake*, 4 Bing. N. C. 463.

"Sold, and will be conveyed, subject," &c.

A condition that "the property is sold, and will be conveyed subject to all rents and easements," was held to entitle the vendor to have a reservation to that effect inserted in the habendum of the conveyance, though it was not shown that there were any rents or easements to which the property was subject: *Gale* v. *Squier*, 5 Ch. D. 625. This could not be insisted upon, unless the vendor had clearly stipulated for it, see *Re Monckton and Gilzean*, 27 Ch. D. 555; or unless the purchaser had clear notice that he was buying subject to a restrictive covenant, for a breach of which the vendor might be liable: *Moxhay* v. *Inderwick*, 1 De G. & S. 708. And see *Pollock* v. *Rabbits*, 21 Ch. D. 466; *Hardman* v. *Child*, 28 Ch. D. 712.

Sect. 15.—*Land for Building.*

"Building land" implies that land can be used for building.

Where land is put up for sale as building land, the fact that great part of it is useless for that purpose would be ground for releasing the purchaser from his bargain, certainly if the particulars were so framed as to conceal the fact; *e. g.*, where a right of way existed across the land: *Dykes* v. *Blake*, 4 Bing. N. C. 463; or where the land was subject to easements for carrying water across it: *Shackleton* v. *Sutcliffe*, 1 De G. & Sm. 609; which would entitle the owner of the dominant tenement to prevent the servient tenement from being built upon: *Goodhart* v. *Hyett*, 25 Ch. D. 182.

Intended roads.

In order that land may be sold to advantage in lots as building land, it is frequently necessary that new roads should be made. These are sometimes made by the vendor before sale, but more often they are marked out on a map or plan as intended roads. The question then may arise how far the vendor is bound to make the roads, and how far he is bound to make them exactly as shown on the plan. In order, on the one hand, not to prejudice the sale by fears on the part of intending purchasers that the roads will not be made as shown, and, on the other hand, to avoid involving the vendor in awkward liabilities, the conditions of sale should be framed with great care.

Plan showing intended roads.

The mere exhibition at the sale of a plan of an intended street does not of itself amount to an engagement that all that is exhibited on the plan shall be done: *Heriot's Hospital* v. *Gibson*, 2 Dow. 301; *Squire* v. *Campbell*, 1 Myl. & Cr. 459; but where the auctioneer at the sale declares that certain roads will be made or widened, if this is not done, the Court will refuse specific performance against a purchaser who was induced to buy by such representations: *Beaumont* v. *Dukes*, Jac. 422; *Myers* v. *Watson*, 1 Sim. N. S. 523; *S. C.* sub nom. *Rose* v. *Watson*, 10 H. L. Cas. 672.

Roads may be varied.

Even where the vendor is bound to make the roads, they need not be made exactly as represented on the plan. Thus, where the agreement distinctly referred to the plan, that alone was held not enough to render the marking on the plan of the width of an intended street a representation by which the vendor was

bound: *Nurse* v. *Lord Seymour*, 13 Beav. 254, 269; but where the property was described as "eligible for the erection of genteel residences of a superior description," and reference was made to a map showing intended new roads, and it was provided that the vendor should make the roads, it was held that he could not divide the land in a different manner so as to attract a different class of population: *Peacock* v. *Penson*, 11 Beav. 355.

But not so as to attract a different class.

In *Randall* v. *Hall* (4 De G. & Sm. 343), land was put up for sale in lots for building; the particulars referred to a plan
the auctioneer at the sale referred to
resent that the vendor guaranteed to
lots were sold, and the plan was after-
e roads as shown could not be carried
: it was held that a purchaser at the
a way over the road adjoining the lot
ence by the nearest road to the high-
le (4 Exch. 375), where, in the convey-
one lot, the vendors covenanted that
sufficient roads over the fields they had
ing lots, they were held not to have
rely by making a road up to the pur-
re was no plan delineating the course
nd although no other houses than the
uilt. In this case the vendors were

Agreement to make roads specifically

or to make a road on his land is one
ly enforced: *Storer* v. *Great Western*

Ch. III. s. 15.

chaser will not be bound by them: *Taylor* v. *Gilbertson*, 2 Drew. 391.

Tenant for life selling land for building.

A tenant for life can lay out streets and make sewers on a sale of land for building purposes, see Settled Land Act, 1882, s. 16.

With regard to restrictions on the position and plan of the houses to be built and the purposes for which they may be used, and the mutual rights of the several purchasers to enforce such restrictions, see cases cited, *post*, pp. 227 and 231.

Sect. 16.—*Apportionment of Rent.*

Where the owner of leaseholds or of freehold land, subject to a rent-charge, is selling part of the land, or is selling the whole in lots, it is necessary to provide for the apportionment of the burden of the rents.

Rent-charges.

Unless rent-charges can be apportioned under 17 & 18 Vict. c. 97, ss. 10—14, or released as to part of the land charged under 22 & 23 Vict. c. 35, s. 10: see *Booth* v. *Smith*, 33 W. R. 142; or redeemed under sect. 45 of the Conveyancing Act, 1881, each lot must remain subject to the whole burden, and the vendor must fix by the conditions how much each lot is to bear.

14 QBD 316.

Rent.

On the sale of leaseholds, where the lessor refuses to concur in the apportionment of the rent, the best course is to assign the lease to the principal purchaser, and to require him to grant underleases for the term, less one day, to the other purchasers. In such case the apportioned rents should be reserved to the assignee, and he should covenant to indemnify the other purchasers against the breach of any covenant in the original lease, and the underlessees should covenant with the assignee for payment to him of their portion of rent and for observance of the covenants in the original lease, so far as relates to their lots: see Dav. Conv. I. 546, *Brown* v. *Paull*, 2 Jur. N. S. 317. This plan is preferable to giving cross powers of distress and entry.

On sale of reversion.

Where the owner of the reversion on a lease is selling part of

the reversion, or selling it in lots, the benefit of the rent must be apportioned.

Covenants and conditions.

The statute 32 Hen. 8, c. 34, s. 1, enabled the grantees or assignees of the whole of the reversion to enter for non-payment of the rent, and to sue for breaches of covenant. And at law, the assignee of part of the reversion could sue for his proportion of rent upon the covenant in the lease, but he could not enter for non-payment of rent, because, while the benefit of a covenant could be apportioned, the benefit of a condition could not: see *Twynam* v. *Pickard*, 2 B. & Ald. 105; *Wright* v. *Burroughes*, 3 C. B. 685. By 22 & 23 Vict. c. 35, s. 3, it was enacted, that where the reversion upon a lease was severed, and the rent legally apportioned, the assignee of each part of the reversion should, in respect of his apportioned rent, have the benefit of all conditions or powers of re-entry. This, however, only applied where a legal apportionment had been made, which could be done either by the verdict of a jury or by consent of the tenant: see St. Quia Emptores, 18 Ed. I. c. 1; *Walter* v. *Maunde*, 1 J. & W. 181; *Bliss* v. *Collins*, 4 Mad. 229; 1 J. & W. 426; 5 B. & Ald. 876.

Conveyancing Act, 1881, s. 10.

Now, by sect. 10 of the Conveyancing Act, 1881, in all leases made after the commencement of the Act, rent, and all covenants and conditions are declared to be incident to the reversionary estate in the land, or in any part thereof, notwithstanding severance, and may be recovered and enforced by the person entitled to the income of the whole or any part of the land leased: and see *The Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48.

Sect. 17.—*Indemnity by Purchaser of Lease.*

On a sale of leaseholds it is usual to provide that the purchaser shall covenant to indemnify the vendor against the rent and covenants in the lease.

Assignee of lease bound to indemnify assignor.

The assignee of a lease is bound to indemnify the assignor independently of any condition: *Burnett* v. *Lynch*, 5 B. & C. 589; even though he is only an equitable assignee: *Close* v. *Wilberforce*, 1 Beav. 112; *Sanders* v. *Benson*, 4 Beav. 350;

Ch. III. s. 17.

until he has assigned over: *Wolveridge* v. *Steward*, 1 Cr. & M. 644. And he can be compelled to enter into a covenant to that effect: *Pember* v. *Mathers*, 1 Bro. C. C. 52; even though the assignor is an executor, and therefore not himself liable on the covenants in the lease: *Staines* v. *Morris*, 1 V. & B. 8; *Cochrane* v. *Robinson*, 11 Sim. 378; or a trustee in bankruptcy: *Ex parte Buxton*, 15 Ch. D. 289, overruling *Wilkins* v. *Fry*, 1 Mer. 244.

In *Moxhay* v. *Inderwick* (1 De G. & S. 708), where a vendor of freeholds had on his purchase entered into a covenant prohibiting building, and subsequently sold giving notice of such covenant, it was held that the purchaser from him could not enforce specific performance without giving a like covenant to the vendor.

Sect. 18.—*Expenses of proving Title.*

Conveyancing Act, 1881.

The Conveyancing Act, 1881, s. 3, sub-s. 6, throws the expense of verifying the title by means of documents and information not in the vendor's possession upon the purchaser: and see *post*, p. 190.

It may, however, be necessary to provide specially that the purchaser shall bear the expense of stamping any unstamped or insufficiently stamped documents, and of registering any documents which ought to be registered; such expenses, in the absence of any condition, falling on the vendor: *Smith* v. *Wyley*, 16 Jur. 1136.

Sect. 19.—*Deeds.*

The right to the deeds goes with the legal ownership of the land: *Harrington* v. *Price*, 3 B. & Ad. 170.

Where lost.

If the title deeds are lost, the vendor should provide against the purchaser requiring their production or insisting on better evidence of their contents and execution than he is able to afford: *Bryant* v. *Busk*, 4 Russ. 1.

Retained by vendor.

Where the vendor retains any part of an estate to which any documents of title relate, he will be entitled to retain such

documents. See Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, sub-s. 5.

Largest purchaser.

Where land is sold in lots, the purchaser of the lot largest in value would, in the absence of any stipulation, be entitled to the custody of the title deeds; but if the conditions provide that the purchaser of the largest lot shall have them, that will mean the largest in superficial extent: *Griffiths* v. *Hatchard*, 1 K. & J. 17; and the purchaser of such lot will be entitled to them in preference to a purchaser of several smaller lots whose total acreage exceeds his: *Scott* v. *Jackman*, 21 Beav. 110.

Sect. 20.—*Compensation.*

Independently of any provision in the contract, the vendor or purchaser may in certain cases be entitled to specific performance with compensation. This subject is treated in Chap. XXV.

Usual condition.

It is usual, however, expressly to provide that any error in the particulars shall not annul the sale, and either that compensation shall be made in respect thereof on either side, or that no compensation shall be allowed.

Cases in which purchaser may nevertheless rescind.

With regard to the provision allowing compensation, it has been held that it has no application where the vendor is unable to carry out substantially his part of the contract, and in such cases the purchaser is entitled to rescind.

Thus, where the property turned out to be of a different tenure from that contracted to be sold: *Madeley* v. *Booth*, 2 De G. & S. 718; *Ayles* v. *Cox*, 16 Beav. 23; or where the quantity was grossly deficient: *Price* v. *North*, 2 Y. & C. Ex. 620; *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; or though not grossly deficient, was by reason of a slight deficiency useless for the purpose intended: *In re Deptford Creek Bridge Co. and Beavan's Contract*, 27 Sol. J. 312; or where the property is subject to restrictions or easements which substantially interfere with its enjoyment: *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; or where the particulars state that certain enumerated trades

Ch. III. s. 20.

cannot be carried on, and the enumeration of forbidden trades is very incomplete: *Flight* v. *Booth*, 1 Bing. N. C. 370; or where some right essential to the property—*e. g.* a right to water—is doubtful: *Price* v. *Macaulay*, 2 De G. M. & G. 339; or where no title could be shown to an essential part: *Dobell* v. *Hutchinson*, 3 A. & E. 355; *Robinson* v. *Musgrove*, 2 Moo. & R. 92; or where houses Nos. 2 and 3 in a street were described as Nos. 3 and 4: *Leach* v. *Mullett*, 3 Car. & P. 115; or where a house described as in Pall Mall was in a passage leading into Pall Mall: *Stanton* v. *Tattersall*, 1 Sm. & G. 529; or where property described as being one mile from Horsham was really between three and four miles distant: *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; and in other cases where the vendor had so misdescribed the property as to deceive the purchaser upon any material point: see *Swaisland* v. *Dearsley*, 29 Beav. 430; *Stewart* v. *Alliston*, 1 Mer. 26; *Robinson* v. *Musgrove*, 2 Moo. & R. 92; *Mills* v. *Oddy*, 6 Car. & P. 728; *Ridgway* v. *Gray*, 1 Mac. & G. 109; *Dimmock* v. *Hallett*, L. R. 2 Ch. 21; *Denny* v. *Hancock*, L. R. 6 Ch. 1; *Brewer* v. *Brown*, 28 Ch. D. 309;—in all such cases the purchaser was held entitled to rescind.

Condition for no compensation.

In such cases, too, the purchaser will be equally entitled to rescind, although the conditions provide that any misdescription shall not annul the sale nor shall compensation be allowed: *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; *In re Arnold*, 14 Ch. D. 270.

But if the vendor has given clear warning to the purchaser that his title may be defective in certain particulars, and has precluded him from objecting on that ground and from requiring compensation, he can enforce specific performance of the entire agreement without abatement: *Nicoll* v. *Chambers*, 11 C. B. 996, in which case the abstract showed title to 3r. 24p. instead of 1a. 2r. 8p. See also *Brownlie* v. *Campbell*, 5 App. Cas. 925.

Where compensation cannot be calculated.

Even where the misdescription is not very gross the purchaser will be entitled to rescind where the circumstances of the case are such that the Court cannot measure the extent of the deficiency or ascertain the amount of compensation: *Sherwood*

v. *Robins*, 1 Moo. & M. 194; *Lord Brooke* v. *Rounthwaite*, 5 Hare, 298.

Compensation enforced by vendor.

The vendor can, under this condition, enforce specific performance with compensation where the misdescription is obvious on an inspection of the premises, and was not wilful or designed: *Wright* v. *Wilson*, 1 Moo. & R. 207; or where there is only a comparatively slight deficiency in quantity: *Leslie* v. *Tompson*, 9 Hare, 268; and see *Leyland* v. *Illingworth*, 2 De G. F. & J. 248. And even where the vendor fails to show title to a large portion of the property, he can enforce specific performance with compensation if his conditions of sale have sufficiently precluded the purchaser from taking objections: *English* v. *Murray*, 32 W. R. 84.

Compensation in favour of vendor.

It is doubtful whether in any case the vendor can insist on the purchaser increasing his purchase-money if the property turns out to be larger or more valuable than supposed, unless where one portion of the land sold is understated, and another portion overstated, so that the two can be to some extent set off: *Leslie* v. *Tompson*, 9 Hare, 268. At the utmost he would probably only be permitted to rescind the contract: *Price* v. *North*, 2 Y. & C. Ex. 620, and see 34 Beav. at p. 613; and it seems that this would certainly be the case if the vendors were trustees: *Mortlock* v. *Buller*, 10 Ves. 291; *White* v. *Cuddon*, 8 Cl. & F. 766.

Sect. 21.—*Completion of Purchase.*

The conditions should fix the day for completion. It is usual also to provide that on that day the purchase-money shall be paid, and the vendor shall execute the conveyance, which is to be prepared by and at the expense of the purchaser.

Conveyance.

In the absence of any stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution: *Poole* v. *Hill*, 6 M. & W. 835.

Separate conveyances.

The vendor must execute separate conveyances of the property in parcels, if required by the purchaser: *Earl of Egmont* v. *Smith*, 6 Ch. D. 469; and see *post*, p. 281.

Outgoings.

It is usual also to provide that all outgoings up to the day

Ch. III. s. 21.

named for completion shall be cleared by the vendor. In the absence of any express stipulation he will be bound to do this down to the time when a good title is shown: *Carrodus* v. *Sharp*, 20 Beav. 56.

Outgoings include part of the current rent: *Lawes* v. *Gibson*, L. R. 1 Eq. 135; also a charge under the Public Health Act for improvements to a street executed before the sale: *Midgley* v. *Coppock*, 4 Ex. D. 309; even though the apportionment of the charge is not made among the different properties until after the date fixed for completion of the purchase: *Re Furtado and Jeffries*, Sol. Jour. 1883, p. 466.

The two last-mentioned cases apply only as between vendor and purchaser. The local authorities have a charge upon the land for the cost of such improvements, no matter in whose hands the land may be at the time of enforcing the charge. See *Reg.* v. *Swindon Local Board*, 4 Q. B. D. 305; *Corporation of Sunderland* v. *Alcock*, 30 W. R. 655; *Corporation of Birmingham* v. *Baker*, 17 Ch. D. 782.

The vendor of a manor is entitled to the fines payable on the deaths of tenants between the date of the contract and the day for completion, although the fines are not, in fact, paid until after that day: *Cuddon* v. *Tite*, 1 Giff. 395.

Interest and possession.

It is usual also to provide by the conditions that interest on the purchase-money shall commence to run from the day named for completion, and that the purchaser shall be entitled to possession, or to the rents and profits from that day.

Where completion is delayed.

Where the condition provides that interest is to be paid if delay arises from the default of the purchaser, he will not have to pay interest if the vendor is in default: *Perry* v. *Smith*, 1 Car. & M. 554; *Parkin* v. *Thorold*, 16 Beav. 59; *Denning* v. *Henderson*, 1 De G. & S. 689. But where, as is now usual, the condition is made to apply to delay from any cause whatever, the purchaser must pay interest, even though the vendor is in default: *Esdaile* v. *Stephenson*, 1 Sim. & S. 122; *Cowpe* v. *Bakewell*, 13 Beav. 421; *Bannerman* v. *Clarke*, 3 Drew. 632; *Grove* v. *Bastard*, 1 De G. M. & G. 69; *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517; *Tewart* v. *Lawson*, 3 Sm. & G. 307; *Vickers* v. *Hand*, 26 Beav. 630; *Lord Palmerston* v. *Turner*, 33 Beav.

524; *Williams* v. *Glenton*, L. R. 1 Ch. 200: *De Visme* v. *De Visme* (1 Mac. & G. 336) is on this point overruled, see *Vickers* v. *Hand*, 26 Beav. 630.

Wilful delay by vendor.

The purchaser will not, however, even under this condition, be compelled to pay interest if the vendor is guilty of fraud or misconduct or wilful delay (see *Vickers* v. *Hand*, 26 Beav. 630; *Lord Palmerston* v. *Turner*, 33 Beav. 524; *Williams* v. *Glenton*, 34 Beav. 528; L. R. 1 Ch. 200), but he may be put to his election either to pay interest or to rescind the contract: *Williams* v. *Glenton*, *supra*.

In *Greenwood* v. *Churchill* (8 Beav. 413) the purchaser was ordered to pay interest, but without prejudice to any application for compensation in respect of the delay.

Rate of interest.

In the absence of stipulation interest will be allowed at the rate of four per cent. (*Calcraft* v. *Roebuck*, 1 Ves. jun. 221; and see Sug. V. & P. p. 643); or, under special circumstances, five per cent., see *Firth* v. *Midland Railway Co.*, L. R. 20 Eq. 100. The condition may provide for an increase in the rate of interest if the money is not paid after a further date: *Herbert* v. *Salisbury and Yeovil Railway Co.*, L. R. 2 Eq. 221.

Appropriation of purchase-money.

The purchaser may in certain cases appropriate his purchase-money, as by depositing it at interest in a bank, and thereby escape paying interest under the contract. As to this, see *post*, p. 258.

Sect. 22.—*Resale.—Forfeiture of Deposit.*

The conditions of sale should provide that if the purchaser fails to comply with the conditions his deposit will be forfeited, the vendors may resell, and any deficiency in price and expenses shall be made good by the purchaser as liquidated damages.

In the absence of such a condition the vendor would be entitled either to hold the deposit as damages (*Ex parte Barrell*, L. R. 10 Ch. 512; *Collins* v. *Stimson*, 11 Q. B. D. 142), or to have a resale and to recover any deficiency in price and expenses against the purchaser: *Hope* v. *Booth*, 1 B. & Ad. 498; *Ex parte Lord*

Ch. III. s. 22.

Seaforth, 19 Ves. 234; *Gray* v. *Gray*, 1 Beav. 199; *Harding* v. *Harding*, 4 My. & Cr. 514; *Noble* v. *Edwardes*, 5 Ch. D. 378.

Deposit and damages.

But to enable the vendor to hold the deposit as forfeited and also to recover damages, it should be clearly so provided by the conditions (*Palmer* v. *Temple*, 9 A. & E. 508; *Icely* v. *Grew*, 6 N. & M. 467; *Nicoll* v. *Chambers*, 11 C. B. 996; *Hinton* v. *Sparkes*, L. R. 3 C. P. 161), and even so the deposit will be set off against the damages: *Ex parte Hunter*, 6 Ves. 94; *Palmer* v. *Temple*, 9 A. & E. 508; *Ockenden* v. *Henly*, E. B. & E. 485.

In the event of the second sale realizing more than the first, the purchaser at the first sale could not call for an account of the surplus: *Ex parte Hunter*, 6 Ves. 94, 97.

Forfeiture of deposit not a penalty.

Where it is provided that the deposit shall be forfeited on breach of the conditions, the forfeiture will be enforced and not treated as a penalty, even though some of the conditions are trivial or provide for payment of a fixed sum of money: *Wallis* v. *Smith*, 21 Ch. D. 243.

Purchaser entitled to recover deposit.

But if the vendor fails to make out his title in accordance with the contract, the purchaser can recover his deposit (*Clarke* v. *Willott*, L. R. 7 Ex. 313; *Want* v. *Stallibrass*, L. R. 8 Ex. 175), with interest at four per cent.; and he will have a lien on the estate for the same and for costs (*Lord Anson* v. *Hodges*, 5 Sim. 227; *Wythes* v. *Lee*, 3 Drew. 396; *Middleton* v. *Magnay*, 2 H. & M. 233; *Turner* v. *Marriott*, L. R. 3 Eq. 744), and under special circumstances he will be entitled to damages; see *post*, p. 496.

CHAPTER IV.

SALES BY AUCTION.

SECT.		PAGE
1.	*The Conduct of the Auction*	99
2.	*The Auctioneer*	101
	i. *His authority*	101
	ii. *His position as agent*	101
	iii. *His liability*	103
	(a) *To the vendor*	103
	(b) *To the purchaser*	103
	iv. *His remuneration*	104
3.	*The Auction*	106
	i. *The Sale of Land by Auction Act*, 1867	106
	ii. *Sale without reserve*	107
	iii. *Sale with reserve*	107
	iv. *Biddings*	108
4.	*The Deposit*	109
	i. *The auctioneer a stakeholder*	109
	ii. *Payment by cheque*	111
	by bill of exchange	111
	by cash	111
	iii. *Interpleader*	112
	iv. *Forfeiture*	115
	v. *Lien*	117

SECT. 1.—*The Conduct of the Auction.*

Sales by auction within Statute of Frauds.

In a sale by auction, the price is ascertained by the competition of rival biddings; but since this manner of sale is, notwithstanding its publicity, within the Statute of Frauds (*ante*, p. 2), a written agreement is necessary when the subject-matter of the contract is an estate or interest in land. This agreement almost always assumes the form of a memorandum, indorsed on the particulars and conditions of sale, incorporating them by express reference. The purchaser should require the vendor, or the auctioneer on his behalf, to sign a counterpart memorandum; as otherwise he will be bound and the vendor free. When property is sold in lots, a distinct contract arises in respect of each lot: *Emmerson* v. *Heelis*, 2 Taunt. 38; *Roots* v. *Lord Dormer*, 4 B. & Ad. 77.

Trustees for sale.

Where a trust for sale or a power of sale is vested in trustees they may, unless a contrary intention is expressed in the instrument creating the trust or power, sell either by public auction or by private contract: Conveyancing Act, 1881 (44 & 45 Vict.

Chap. IV. s. 1.

c. 41), s. 35. This section of the Conveyancing Act is not retrospective, but it is, so far as this provision is concerned, merely declaratory of the previous law. See also 23 & 24 Vict. c. 145, ss. 1, 2. Where an agent or trustee is authorized to sell any property in a particular manner, the authority is limited to that particular mode of selling, and he cannot exceed the scope of his authority: per Lord Romilly, M. R., *Bousfield* v. *Hodges*, 33 Beav. 90; and see *Daniel* v. *Adams*, Amb. 495.

Tenant for life.

A tenant for life, selling under the powers of the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 4), may sell in one lot or in several lots, and either by auction or by private contract.

Trustee in bankruptcy. Liquidators.

So, also, trustees in bankruptcy (46 & 47 Vict. c. 52, s. 56), and liquidators under the Companies Act, whether the winding-up is voluntary (Comp. Act, 1862, s. 133), under supervision (*Ibid.* s. 151), or compulsory (*Ibid.* s. 95), but in the last case only with the sanction of the Court, have power to sell by public auction or private contract, and as a whole or in parcels.

Different practice in different localities.

The practice varies in different parts of the country as to the distribution between the solicitor and the auctioneer of work pertaining to an auction. In London and in the southern counties the auctioneer, who is there paid by commission, undertakes the preparation of the particulars of sale, the division into lots, and very often preliminary valuations; the solicitor's duty being confined to purely legal matters. But, in Liverpool, Manchester, and throughout the north of England, the custom prevails for the solicitor to execute, with the assistance, if necessary, of surveyors and valuers, all the preparatory work, leaving to the auctioneer nothing more than the ministerial duty of receiving the biddings. For this he is generally paid a small fee for each lot, irrespective of value.

Importance of preliminary investigation of title.

By whomsoever the duty may be undertaken, the preparation of particulars of sale, and the fixing of the reserve price, are matters requiring great judgment and experience. Still more onerous is the duty of preparing special conditions adapted to the peculiarities of the title. This should never be neglected; and the abstract should be examined as carefully on behalf of the vendor before as on behalf of the purchaser after the sale; the object of the vendor being to anticipate all inconvenient objec-

tions to the title, and by properly-framed conditions to preclude the purchaser from raising them after the sale. See Ch. III. *Particulars and Conditions of Sale.* Chap. IV. s. 1.

Sect. 2.—*The Auctioneer.*

His authority.

The authority of the auctioneer need not be in writing, and may be revoked or qualified at any time before the sale: *Manser* v. *Back*, 6 Hare, 443; *Warlow* v. *Harrison*, 1 E. & E. 295.

The revocation of the authority of the auctioneer is operative *per se*, and is binding upon persons ignorant of the fact: *Ibid.*

The auctioneer has no authority to sell by private contract in case of the sale by auction proving abortive: *Marsh* v. *Jelf*, 3 F. & F. 234.

If an auctioneer sells the property after the limit of time fixed in his authority, or without any authority, he is personally liable to the purchaser for the repayment of the deposit with interest, and the costs of investigating the title: *Bratt* v. *Ellis*, Sug. V. & P. App. 812. But the purchaser cannot recover damages for the loss of his bargain: *Jones* v. *Dyke*, Sug. V. & P. App. 813. And see *post*, Ch. XXIX. *Common Law Remedies.*

An authority to sell by public auction does not authorize the auctioneer to sell by private contract, but it seems that a purchaser who has duly signed a contract for the purchase of a lot at the reserved price cannot take the objection that the authority of the auctioneer had ceased: *Else* v. *Barnard*, 28 Beav. 228.

Trustee acting as auctioneer.

On the principle that a trustee cannot make a profit out of his trust, an executor or trustee who acts as auctioneer in the sale of the trust property is not entitled to charge commission (*Kirkman* v. *Booth*, 11 Beav. 273); unless the deed, expressly or by implication, authorizes the charge: *Douglas* v. *Archbutt*, 2 De G. & J. 148. And the same rule applies where a mortgagee, selling under his power, employs a firm of auctioneers of which he is a member: *Matthison* v. *Clarke*, 3 Drew. 3. See, however, *Miller* v. *Beal*, 27 W. R. 403.

Position of

On a sale by auction, the auctioneer is the agent of both

Chap. IV. s. 2.

auctioneer as agent.

parties for the purpose of signing a note or memorandum in writing: *Simon* v. *Metivier*, 1 W. Bl. 599; 3 Burr. 1921; *Hinde* v. *Whitehouse*, 7 East, 558. He is authorized thereunto on behalf of the vendor by his appointment, and on behalf of the purchaser by the bidding (*Emmerson* v. *Heelis*, 2 Taunt. 38; *White* v. *Proctor*, 4 Taunt. 209; *Kemeys* v. *Proctor*, 3 V. & B. 57); but the agency to sign the purchaser's name may be rebutted: *Bartlett* v. *Purnell*, 4 Ad. & E. 792. Writing down the name of the highest bidder in the auctioneer's book is a sufficient signature to satisfy the Statute of Frauds: *White* v. *Proctor*, 4 Taunt. 209. But, in such a case, the conditions of sale must be incorporated in order to constitute a valid contract: *Hinde* v. *Whitehouse*, 7 East, 558; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Rishton* v. *Whatmore*, 8 Ch. D. 467.

Where the purchaser employs an agent to bid, such agent may, it seems, in like manner constitute the auctioneer his agent for the purposes of signature: *White* v. *Proctor*, 4 Taunt. 209.

Agency for vendor.

Until the fall of the hammer, which indicates the acceptance of the last bid, the auctioneer is exclusively the agent of the vendor (*Warlow* v. *Harrison*, 1 E. & E. 295); and so, the moment the sale is over, "the auctioneer is no longer the agent of both parties, but of the seller only:" *Mews* v. *Carr*, 1 H. & N. 484.

For purchaser.

The agency of the auctioneer, so far as the purchaser is concerned, is limited to the signing of his name; and, accordingly, it is not inconsistent with his duty towards the purchaser to act as auctioneer of his own property: *Flint* v. *Woodin*, 9 Hare, 618, 622.

Auctioneer cannot delegate his authority.

The auctioneer cannot delegate to another any part of his duties, the performance of which involves personal skill and integrity (*Cockran* v. *Irlam*, 2 M. & S. 301; see *Henderson* v. *Barnewall*, 1 Y. & J. 387); nor can he authorize his clerk to sign a note of the contract on behalf of the vendor: *Coles* v. *Trecothick*, 9 Ves. 234, 251.

Auctioneer's clerk.

The auctioneer's clerk has no authority by general custom to sign the name of the highest bidder (*Peirce* v. *Corf*, L. R. 9 Q. B. 210); but under special circumstances, as, for example,

when he is authorized by word or gesture, he will be held to have authority as an agent of the bidder for that special purpose: *Bird* v. *Boulter*, 4 B. & Ad. 443; *Bartlett* v. *Purnell*, 4 Ad. & E. 792.

Liability of auctioneer.

An auctioneer cannot, in conducting an auction, deviate from the strict terms of the conditions of sale, or he will be personally liable for all the consequences of doing so: *Jones* v. *Nanney*, 13 Price, 76. He may incur liability towards the vendor or the purchaser.

i. To the vendor.

An auctioneer is liable to an action for any breach of duty, but only nominal damages can be recovered where no special loss is proved. Thus, in a case at Nisi Prius, where the conditions of sale provided that the highest bidder should immediately sign a contract and pay a deposit, it was left to the jury to say whether there was a breach of duty in letting the purchaser go away without signing or paying the deposit: *Hibbert* v. *Bayley*, 2 F. & F. 48.

Negligence.

So, if an auctioneer is guilty of negligence whereby the sale becomes nugatory, he cannot recover compensation from the vendor in respect of his services: *Denew* v. *Daverell*, 3 Camp. 451.

Damages.

Since a sale in excess of authority is not binding on the vendor, it would seem that, in such a case, he could only recover from the auctioneer damages for breach of duty in not selling.

ii. To the purchaser.

The auctioneer may, it seems, be sued by the purchaser if he does not at the time of the sale disclose the name of his principal (*Hanson* v. *Roberdeau*, Pea. N. P. 120; *Franklyn* v. *Lamond*, 4 C. B. 637), or if his authority has been revoked; but he may, in that case, be entitled to an indemnity from the vendor: *Warlow* v. *Harrison*, 29 L. J. Q. B. 14.

Where the conditions of sale express that the property is to be sold "without reserve," the auctioneer thereby contracts with the highest bidder that the sale shall be conducted in that manner; and he is liable to an action for a breach of contract if the vendor bids at the sale: *Ibid.*

Further, if the auctioneer inserts, without the authority of the vendor, a condition that the sale shall be "without reserve,"

Chap. IV. s. 2.

he will be liable on his undertaking to sell in that manner: *Ibid.*

Where an auctioneer advertised a house and shop "for peremptory sale by auction by direction of the mortgagee," and reference for further information was made to a named solicitor or the auctioneer; the property having been bought in at the auction, the latter was held not to be personally liable on the footing of a personal contract or undertaking that the property should be peremptorily sold. *Mainprice* v. *Westley* (11 Jur. N. S. 975), where Blackburn, J., said: "The character of an auctioneer as agent is unlike that of many other agents, as to whom, so long as the fact of there being a principal is undisclosed, it remains uncertain whether the contracting party is acting as principal or agent; while in the employment and duty of an auctioneer, the character of an agent is necessarily implied, and the party bidding at the auction knowingly deals with him as such, and with the knowledge that his authority may at any moment be put an end to by the principal." See, however, *Hanson* v. *Roberdeau*, Pea. N. P. 120; *Franklyn* v. *Lamond*, 4 C. B. 637. As to the auctioneer's liability in respect of the deposit, see *post*, p. 110.

For selling without authority.

Although an agent may contract expressly as an agent, and cannot therefore be sued as a principal, the purchaser may bring an action against him, where he sells without authority, for representing himself to have such an authority: *Collen* v. *Wright*, 8 E. & B. 647.

Remuneration.

In the absence of an express contract auctioneers are entitled to reasonable remuneration for the services rendered. They may, it seems, charge for the expenses of abortive sales, and for sales by private contract effected through their instrumentality, but they cannot be held entitled both to their expenses and a fixed fee, and also to commission: *Clark* v. *Smythies*, 2 F. & F. 83.

The auctioneer's remuneration should of course be agreed upon before the sale; but if no special contract be entered into he can in general only recover on a *quantum meruit*. Evidence of a custom regulating the amount of remuneration may be received: *Maltby* v. *Christie*, 1 Esp. 340.

When entitled to commission.

The auctioneer is entitled to his commission if the relation of

buyer and seller has been really caused and brought about by what he has done; if, in other words, he was the *causa causans* by which the property was sold: *Green* v. *Bartlett*, 32 L. J. C. P. 261; 14 C. B. N. S. 681.

Fiduciary position.

An auctioneer who fills a fiduciary position cannot, as already stated, charge commission: *ante*, p. 101.

Where an agent employed to sell land sold it to a company in which he was interested as a shareholder and director, it was held that he was not entitled to commission: *Salomons* v. *Pender*, 3 H. & C. 639.

Negligence.

Negligence or misconduct will also disentitle him to any remuneration: *Denew* v. *Daverell*, 3 Camp. 451; Sug. V. & P. 45.

Sales by the Court.

In sales by the Court a fixed sum is sometimes paid to the auctioneer for the entire sale or for each lot, and sometimes a commission is allowed on each lot sold, and a fixed sum for each lot not sold: Dan. Ch. Pr. 1079, 6th ed.

When allowed on taxation.

The auctioneer's commission is a disbursement, which for purposes of taxation will be allowed to a solicitor who has properly paid it: *Re Page*, 32 Beav. 487. And by the General Order made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), auctioneers' or valuers' charges are excluded from the remuneration prescribed by Schedule I. (Rule 4). If, however, the solicitor himself conducts a sale of property by public auction that schedule provides a scale of charge to which he will be entitled; but only where no commission is paid by the client to an auctioneer (Rule 11).

In a sale under the Settled Land Act, where the property was unsuccessfully offered for sale by auction, and on the same day was sold by private contract, it was declared that the trustees might pay out of the purchase-moneys one commission for conducting the sale, including the conditions of sale, and also a commission of one-quarter per cent. to the auctioneers for their charges of the sale: *Re Beck*, 24 Ch. D. 608.

Licence.

As to the auctioneer's licence, and the excise duty payable in respect thereof, see 8 & 9 Vict. c. 15; 27 & 28 Vict. c. 56, s. 14.

Sect. 3.—*The Auction.*

Sale of Land by Auction Act, 1867.

Important alterations in the law relating to auctions were introduced by the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48). Prior to that Act the Courts of Law and Equity differed as to the validity of a sale where a puffer was employed without an express reservation on the part of the vendor of his right to bid. One puffer was considered legitimate in equity, but at law, a single bid on behalf of the owner rendered the sale illegal: *Bexwell* v. *Christie*, Cowp. 395; *Howard* v. *Castle*, 6 T. R. 642; *Rex* v. *Marsh*, 3 Y. & J. 331; *Thornett* v. *Haines*, 15 M. & W. 367; *Warlow* v. *Harrison*, 1 E. & E. 295. See as to the former doctrine of Courts of Equity, *Mortimer* v. *Bell* (L. R. 1 Ch. 10), where the previous cases are examined.

The 4th section of the Sale of Land by Auction Act put an end to this conflict, by enacting that, whenever a sale by auction of land would be invalid at law, by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law.

The next section enacts that the particulars or conditions of sale shall state whether the land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; and that if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person. Sect. 6, which merely expresses what would be held in the absence of any enactment, enacts that the seller may by the particulars or conditions of sale reserve to himself, or any one person on his behalf, a right to bid at the auction in such manner as he may think proper. In order to exclude the operation of this statute, it has become the general practice to insert a condition of sale stating that the property is put up for sale subject to a reserved price, and that the vendor reserves the right of bidding by himself or his agent.

The Act, it will be observed, makes a distinction between a reserved price and a right to bid; and, therefore, when condi-

tions of sale merely stated that the sale was subject to a "reserved bidding," the employment of a person to bid up the property to the reserved price was held to avoid the sale: *Gilliat* v. *Gilliat*, L. R. 9 Eq. 60.

Sale without reserve.

When a property is offered for sale "without reserve," it amounts to a contract with the public that the highest bidder, whatever may be the amount of his bidding, shall be the purchaser, and that there shall be no bidding on the part of the vendor: *Robinson* v. *Wall*, 2 Ph. 372. See also *Meadows* v. *Tanner*, 5 Mad. 34.

The verbal declaration of the auctioneer that the sale is without reserve, though admissible in evidence (*Woodward* v. *Miller*, 2 Coll. 279; *Dimmock* v. *Hallett*, L. R. 2 Ch. 21), does not of course satisfy the words of this Act. It is conceived that if the particulars and conditions of sale do not contain a statement, one way or the other, as to the reserve, the purchaser could not be compelled to complete. Where it is stated that the sale is without reserve, but that the vendor reserves the right to bid, the purchaser has fair warning, and cannot complain if the price is run up solely by competition between himself and the vendor: *Dimmock* v. *Hallett*, L. R. 2 Ch. 21.

Sale with reserve.

There are two ways in which a vendor may guard against his property being sold at a sacrifice, viz., by fixing a reserved price, or by appointing a puffer; and it seems that he may do both. But only one person can act as puffer, and the statute impliedly negatives the right of the vendor, even by express reservation in the conditions of sale, to employ more than one person in that capacity. It is conceived, however, that different persons might bid on his behalf for the several lots so long as one only took part in each competition.

Sale void against purchaser.

The result is that the sale by auction will be illegal, and cannot be enforced against the purchaser (1) If the particulars and conditions do not state whether the sale is without reserve or not; (2) If, the sale being without reserve, a puffer is employed; (3) If under any circumstances two or more puffers are employed (*Smith* v. *Clarke*, 12 Ves. 477, 483; *Wheeler* v. *Collier*, M. & M. 123); or (4) If a limited right of bidding is reserved and is exceeded: *Rex* v. *Marsh*, 3 Y. & J. 331; *Parfitt*

v. *Jepson*, 46 L. J. C. P. 529. See *Heatley* v. *Newton*, 19 Ch. D. 326.

Sale void as against vendor.

A sale may also be void as against the vendor from some irregularity in the conduct of the auction. The sale cannot be supported where the highest bidder has deterred others from bidding: *Fuller* v. *Abrahams*, 3 Bro. & B. 116. But an agreement between two persons that one of them shall not bid against the other (*Galton* v. *Emuss*, 1 Coll. 243), or that one of them shall attend the auction, and that they shall afterwards divide the land, is not illegal, or void on the ground of public policy: *Re Carew*, 26 Beav. 187. The highest bidder cannot enforce the contract where he was reasonably supposed by the vendor to have bid on his behalf (*Mason* v. *Armitage*, 13 Ves. 25); or where, being the solicitor for the vendors, he bid for the property, not on behalf of the vendors, but for an intending purchaser: *Twining* v. *Morrice*, 2 Bro. C. C. 326. In these cases specific performance was refused.

Bidding may be retracted.

A person may retract his bidding before the hammer falls (*Payne* v. *Cave*, 3 T. R. 148); and it seems that the common condition precluding him from doing so is *brutum fulmen*, and is incapable of being enforced by action: Sug. V. & P. 14.

Verbal declarations by auctioneer.

The verbal declarations of the auctioneer are not in general admissible in evidence for the purpose of contradicting, varying, or explaining the particulars or conditions of sale, either for the seller (*Gunnis* v. *Erhart*, 1 H. Bl. 289; *Jones* v. *Edney*, 3 Camp. 285; *Greaves* v. *Ashlin*, *ibid.* 426; *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Heywood* v. *Mallalieu*, 25 Ch. D. 357), or against him (*Powell* v. *Edmunds*, 12 East, 6), or for the purchaser against a sub-purchaser: *Shelton* v. *Livius*, 2 Cr. & J. 411.

Exceptions.

The rule is, however, subject to an exception in favour of a defendant resisting specific performance. See *Higginson* v. *Clowes*, 15 Ves. 516, and notes to *Woollam* v. *Hearn*, 2 L. C. in Eq. 468. It seems also that if by a collateral representation a party be induced to enter into a written agreement different from such representation, he may be entitled to bring an action for the fraud practised to lay asleep his prudence: per Lord Ellenborough, C. J., *Powell* v. *Edmunds*, 12 East, 6, 11. See also *Brett* v. *Clowser* (5 C. P. D. 376), where the inaccurate but

bonâ fide statements of the auctioneer were admitted to vary an unambiguous written contract.

Sect. 4.—*The Deposit.*

Condition of sale as to deposit.

It is generally provided by the conditions of sale that the purchaser shall immediately after the sale pay, either to the auctioneer or to the vendor's solicitor, a certain percentage of his purchase-money by way of deposit.

There are obviously three persons whose interests have to be considered with reference to this subject, viz., the vendor, the purchaser, and the depositee. It will be convenient, in the first place, to consider the duties and rights of the auctioneer or solicitor who receives the deposit, and then to discuss some of the cases which have arisen between vendor and purchaser.

The conditions should state whether the deposit is to be paid to the auctioneer, or to the vendor's solicitor; but if they are silent on the subject the former seems to have an implied authority to receive it: *Sykes* v. *Giles*, 5 M. & W. 645.

Auctioneer a stakeholder.

The auctioneer holds the deposit as a stakeholder, unless it is expressly provided that it shall be received by him as the agent of the vendor; and his duty is to retain it until either a good title is made out, or the contract is rescinded, and then to pay it over according to the event: *Harington* v. *Hoggart*, 1 B. & Ad. 577. See also *Burrough* v. *Skinner*, 5 Burr. 2639; *Gray* v. *Gutteridge*, 1 M. & Ry. 614; *Smith* v. *Jackson*, 1 Mad. 618.

On a sale by the Court, however, the auctioneer is justified in paying it to the solicitors having the carriage of the sale for the purpose of payment into Court; and if it is misappropriated by a member of the firm the auctioneer, as between himself and the partners of the defaulter, can require them to make good the loss: *Biggs* v. *Bree*, 30 W. R. 278.

Not liable for interest.

One of the consequences of his being a stakeholder is that, even if he in fact invests the money, he is not liable to pay interest to the vendor on completion, and this although the investment was made by the direction of the vendor, but without the privity of the purchaser: *Harington* v. *Hoggart*, 1 B. & Ad.

Chap. IV. s. 4.

577. Nor is he liable, upon the failure of the contract, to pay interest to the purchaser, until his character of stakeholder has been determined by a demand for the repayment of the deposit: *Lee* v. *Munn*, 8 Taunt. 45; *Gaby* v. *Driver*, 2 Y. & J. 549.

But, of course, the conditions of sale, or both the vendor and purchaser together, may prescribe a particular form of investment.

When liable to action by purchaser.

If the sale goes off through the default of the vendor, or the imperfection of the title, the purchaser may, in general, maintain an action against the auctioneer for the return of the deposit (*Burrough* v. *Skinner*, 5 Burr. 2639; *Berry* v. *Young*, 2 Esp. 640), even where it has been paid over to the vendor before the defect in the title has been ascertained (*Gray* v. *Gutteridge*, 1 M. & Ry. 614); and the purchaser need not give notice to the auctioneer to retain it: *Ibid.* Nor is notice that the contract has been rescinded, a condition precedent to the bringing of an action against the auctioneer: *Duncan* v. *Cafe*, 2 M. & W. 244.

Agent or stakeholder.

It is important to distinguish the cases in which an auctioneer holds the deposit as a stakeholder, from those where he is merely the agent of the vendor. For where a deposit is lodged with an agent this is, in law, *eo instanti*, a payment to the principal: *Duke of Norfolk* v. *Worthy*, 1 Camp. 337.

Whether the auctioneer is, as regards the deposit, an agent or a stakeholder, depends on the conditions of sale, and the terms of the contract. If it is provided that the deposit shall be paid to him as agent for the vendor, there would seem to be no doubt as to the character in which he receives it; and signing the receipt *as agent* may, as between him and the vendor, be sufficient to fix him with that character.

Solicitor is not a stakeholder.

It is clear that when the solicitor of the vendor receives the deposit, the law does not imply, as in the case of an auctioneer, that he is a stakeholder; and, if he professes to receive it as agent for the vendor, he is bound on demand to pay it over to his principal: *Edgell* v. *Day*, L. R. 1 C. P. 80, approving *Bamford* v. *Shuttleworth*, 11 Ad. & E. 926. And, of course, the same rule applies to an auctioneer if he is the vendor's agent.

Where auctioneer is the solicitor of the vendor.

Where the auctioneer was also the solicitor of the vendor, and, after difficulties had been raised as to the title, paid over the

deposit to his principal, he was held bound to repay the money to the purchaser: *Edwards* v. *Hodding*, 5 Taunt. 815.

The true ground of decision in this case appears to have been, that notice of the defect in the title was equivalent to a mandate from the purchaser not to part with the deposit, in which case it is clear that the agent would hand over the money to his principal at his own risk. See Story on Agency, Ch. 10, § 300.

Solicitor acting for both parties.

A solicitor who acts for both parties may be a stakeholder, and so bound to retain the deposit until the purchase is settled: *Wiggins* v. *Lord*, 4 Beav. 30, as explained in *Edgell* v. *Day*, L. R. 1 C. P. 80.

The relative rights of the parties, therefore, in respect of the deposit, depend on the character in which the person receives it; if as agent for the vendor, the purchaser can only recover it from the vendor; if as stakeholder, the person ultimately entitled will have a right of action for its recovery against the recipient.

Payment by cheque.

It is the universal practice of auctioneers to receive payment of the deposit by a cheque; and if it afterwards turn out that the purchaser is insolvent and his cheque worthless, the vendor, if he is a mortgagee, may add to his security the expenses of the abortive sale: *Farrer* v. *Lacy, Hartland & Co.*, 25 Ch. D. 636. See also *Bridges* v. *Garrett*, L. R. 5 C. P. 451. And there is no ground in such a case for charging the auctioneer with negligence for accepting a cheque from a stranger without references as to his position: *Ibid.*

Bill of exchange.

But the auctioneer should not take a bill of exchange: *Sykes* v. *Giles*, 5 M. & W. 645; *Williams* v. *Evans*, L. R. 1 Q. B. 352.

If the vendor is indebted to the auctioneer, and the intention of the parties is that the debt shall be paid out of the moneys received by the auctioneer, he is impliedly authorized, to the extent at least of his debt, to receive payment in any way he may think fit: *Barker* v. *Greenwood*, 2 Y. & C. Ex. 414.

Cannot set off debt due to purchaser.

Where the auctioneer is indebted to the purchaser he cannot, instead of receiving payment in cash, write off the whole or any part of his own debt. Such a settlement of accounts behind the back of the vendor does not bind him: *Young* v. *White*, 7 Beav. 506.

Procedure when auc-

If the purchaser brings an action against the auctioneer for

Chap. IV. s. 4.

Auctioneer sued by purchaser.

the recovery of the deposit, the latter ought not to defend the action without the authority of the vendor, as otherwise he may have to bear his own costs: *Spurrier* v. *Elderton*, 5 Esp. 1; *Gillett* v. *Rippon*, M. & M. 406.

The proper course for him to pursue in such a case seems to be, in the first place, to apply to the vendor for instructions, and if he resists the claim, and does not indemnify the defendant, the latter may bring in the vendor as a third party under Ord. XVI. r. 48, or take out an interpleader summons under Ord. LVII.

A stakeholder is not bound to undertake the slightest risk or expense in defending an action, and he is justified in calling upon the person really interested to indemnify him against all such risk and expense, and in default he is entitled to interplead: *Nelson* v. *Barter*, 2 H. & M. 334; see also *Hoggart* v. *Cutts*, Cr. & Ph. 197, 205.

If the third party settles the action behind the back of the defendant he will, on application in chambers, be ordered to pay the costs of defending the action: *Jablochkoff Electric Light Co.* v. *McMurdo*, W. N. 1884, 94.

Interpleader.

Ord. LVII. r. 1.

Rule 2.

The auctioneer may, in respect of the deposit, obtain relief by way of interpleader, under the Rules of the Supreme Court, 1883, Ord. LVII. (which now exclusively regulates the practice), where he is, or expects to be, sued by the vendor, and the purchaser making adverse claims thereto (r. 1). The applicant must satisfy the Court or a judge, by affidavit or otherwise, (a) that he claims no interest in the subject-matter in dispute, other than for charges or costs; (b) that he does not collude with either of the claimants; and (c) that he is willing to pay or transfer the subject-matter into Court, or to dispose of it as the Court or a judge may direct (r. 2).

As there is an exception of "charges and costs," the auctioneer is not precluded by this rule, as he was under the former law (see *Mitchell* v. *Hayne*, 2 Sim. & St. 63), from claiming his commission out of the deposit. But it is not probable that the Court or a judge will, on ordering the money into Court, permit the auctioneer to deduct his commission, as that would prejudice the rights of the purchaser if he eventually succeeded.

The applicant may take out a summons, and where he is a defendant at any time after service of the writ, calling on the claimants (*i. e.*, the vendor and the purchaser) to appear and state the nature and particulars of their claims, and either to maintain or relinquish them (r. 5). Proceedings in the action (if any) may be stayed. Rule 5.

If the claimants appear, three courses are open: (1) To make one of the claimants a defendant in the action commenced by the other, in lieu of, or in addition to, the applicant. (2) To direct an issue to be tried between the claimants (r. 7); or, (3) To dispose of the matter in a summary manner (r. 8). The Court has also power for the purposes of any interpleader proceedings to make all such orders as to costs and all other matters as may be just and reasonable (r. 15). But when the purchaser brought an action for the deposit against the auctioneer, and, upon an interpleader summons being taken out, the vendor relinquished his claim, it was held, that the Master had no power under this rule to order that the auctioneer should be at liberty to deduct from the deposit his taxed costs of the original action: *Hansen* v. *Maddox*, 12 Q. B. D. 100. In fact, when the purchaser succeeds in recovering the deposit there is no jurisdiction to apply any part of it in payment of the auctioneer's costs: see *Deller* v. *Prickett*, 15 Q. B. 1081. But, pending a dispute as to title, an auctioneer has been allowed to pay the deposit into Court *minus* his charges and expenses: *Annesley* v. *Muggridge*, 1 Mad. 593. The Vice-Chancellor, indeed, admitted in this case that the order might operate hardly upon the purchaser if the contract were not established, but acted on the principle that "the deposit is the vendor's money, and the risk belonging to it is his:" see also *Yates* v. *Farebrother*, 4 Mad. 239. Rule 7. Rule 8. Rule 15. Costs.

In actions for specific performance, the proper practice is not to make the auctioneer a defendant when he holds a small deposit, at all events until he refuses to pay it into Court. But where it amounted to 6,850*l.*, he was held to be rightly made a defendant: *Egmont* v. *Smith*, 6 Ch. D. 469. When a defendant in specific performance action.

The auctioneer may be made a defendant to an action for the rescission of the contract, where he is a party to the fraud on which the action is founded; and he will not be dismissed from When a party to action for rescission.

Chap. IV. s. 4.

the action unless he submits to give the plaintiff all the relief which in any event he might be called upon to give. Where the sale is proved to have been fraudulent to the knowledge of the auctioneer he must repay the deposit with interest, and submit to an order for the costs of action against him jointly with the other defendants, and not merely such costs as had been incurred previously to the application: *Heatley* v. *Newton*, 19 Ch. D. 326.

Rights of vendor and purchaser.

As between the vendor and the purchaser the deposit, in the absence of express stipulation, is regarded in the first place as a guarantee for the performance of the contract; and, where the contract is completed, as a part payment of the purchase-money: *Howe* v. *Smith*, 27 Ch. D. 89; and see *Ex parte Barrell*, L. R. 10 Ch. 512; *Collins* v. *Stimson*, 11 Q. B. D. 142.

It results from the deposit being a part payment of the purchase-money that the depositor is not entitled, where the deposit has been invested, to the dividends thereon (*D'Oyley* v. *Powis*, 1 Cox, 206); and the vendor must abide by the rise or fall of the funds: *Poole* v. *Rudd*, 3 Bro. C. C. 49; *Ambrose* v. *Ambrose*, 1 Cox, 194.

So, also, where the purchaser was charged with an occupation rent, interest at 4 per cent. on the amount of the deposit was ordered to be deducted from the rent: *Smith* v. *Jackson*, 1 Mad. 618.

The general rule is that a purchaser cannot throw upon the vendor the risk of an investment; but if he makes a payment to, or on account of the vendor, in respect of the purchase, the money paid becomes the property of the vendor, to the extent at least that the purchaser can claim no benefit of any investment which the vendor may make: Per Sir G. Turner, *Burroughes* v. *Browne*, 9 Hare, 609.

Where the deposit is lost through the insolvency of the auctioneer the loss falls on the vendor (*Fenton* v. *Browne*, 14 Ves. 144; *Annesley* v *Muggridge*, 1 Mad. 593; *Rowe* v. *May*, 18 Beav. 613); but fiduciary vendors, in the absence of laches on their part, are not personally liable: *Edmonds* v. *Peake*, 7 Beav. 239.

When the

In the absence of express stipulation, money paid as a deposit

cannot be recovered by the payee if the contract has gone off through his default: *Depree* v. *Bedborough*, 4 Giff. 479; *Ex parte Barrell*, L. R. 10 Ch. 512; *Howe* v. *Smith*, 27 Ch. D. 89. contract goes off.

But in order to enable the vendor to retain the deposit, the acts of the purchaser must amount to a repudiation of the contract, not merely to such delay as would deprive him of the equitable remedy of specific performance: *Howe* v. *Smith*, *supra*, at p. 95.

Thus, if the purchaser repudiates the contract, on an objection to the title which the Court considers unfounded, his action for the recovery of the deposit will be dismissed: *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. 89.

Where a bankrupt, in an assumed name, entered into a contract for the purchase of land, and with money acquired in fraud of his creditors, paid a deposit, which was retained by a stakeholder, it was held that the trustee in bankruptcy could not recover the deposit, although it was sufficiently earmarked to enable the trustee to follow it: *Collins* v. *Stimson*, 11 Q. B. D. 142.

An intention that the deposit shall not be forfeited may be collected from the whole agreement. Thus, where a sum is fixed as liquidated damages in case of either party making default, this sum is clearly the only penalty for a breach, and no forfeiture takes place: *Palmer* v. *Temple*, 9 Ad. & E. 508. Forfeiture depends on construction of agreement.

If the contract provides that the deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may even be for the payment of money on a given day, the bargain of the parties must be carried out, the forfeiture being enforced, and not treated as a penalty: *Wallis* v. *Smith*, 21 Ch. D. 243. See also *Lea* v. *Whitaker*, L. R. 8 C. P. 70; *Re Newman*, 4 Ch. D. 724. Not a penalty.

But in order that the forfeiture of a deposit should not be regarded as a penalty, it would seem that the money must be actually deposited: *Magee* v. *Lavell*, L. R. 9 C. P. 107. See, however, *Hinton* v. *Sparkes* (L. R. 3 C. P. 161), where an I O U was for this purpose treated as equivalent to payment.

A distinction must be drawn between cases in which there never was any enforceable contract and those in which the con- No binding contract.

Chap. IV. s. 4.

tract was originally valid, but has not, through the default of one side or the other, been duly executed.

Purchaser may recover deposit without interest.

If there never was any binding contract, the purchaser can recover his deposit, but without interest: *Gosbell* v. *Archer*, 2 Ad. & E. 500; *Casson* v. *Roberts*, 31 Beav. 613; *Moeser* v. *Wisker*, L. R. 6 C. P. 120.

But it has been held that a purchaser who paid his deposit and received the abstract, after he knew that the vendor's name was not mentioned in the particulars or conditions of sale, could not repudiate the contract and recover the deposit: *Thomas* v. *Brown*, 1 Q. B. D. 714, where Quain, J., said: "Now where, upon a verbal contract for the sale of land, the purchaser pays the deposit, and the vendor is always ready and willing to complete, I know of no authority to support the purchaser in bringing an action to recover back the money:" *Ibid.* p. 723.

Binding contract not carried out.

The Court, on the other hand, where there is a valid contract, will enter into the question by whose default it happened that the contract was not or could not be executed (*Casson* v. *Roberts*, 31 Beav. 613); and where the vendor is in default, as, for example, by not showing a good title, the purchaser can recover the deposit with interest: *Hodges* v. *Earl of Litchfield*, 1 Bing. N. C. 492.

Interest.

Interest can be demanded only by virtue of a contract expressed or implied, or by virtue of the principal money having been wrongfully withheld: per Lord Westbury, *Caledonian Ry. Co.* v. *Carmichael*, L. R. 2 H. L. Sc. 56, 66. There can scarcely be said to be an implied contract to pay interest on the deposit if the contract should not be completed, and it certainly cannot be regarded as "wrongfully withheld" until after a demand for its return. If this be so, interest should only be computed from the date of repudiation, as in *Brewer* v. *Broadwood*, 22 Ch. D. 105; and not from the date of payment, as in *Webb* v. *Kirby*, 7 De G. M. & G. 376, and *Weston* v. *Savage*, 10 Ch. D. 736.

Rate.

In the absence of fraud a court of equity never allows interest at more than 4 per cent. (*Imp. Mercantile Credit Ass.* v. *Coleman*, L. R. 6 H. L. 189, 209); and in ordinary cases this should be the rate allowed on the return of the deposit. See *Lord Anson* v. *Hodges*, 5 Sim. 227; *Turner* v. *Marriott*, L. R. 3 Eq.

744; *Re Arnold*, 14 Ch. D. 270, 285; *Brewer* v. *Broadwood*, 22 Ch. D. 105. In *Weston* v. *Savage* (10 Ch. D. 736), interest appears to have been given at the rate of 5 per cent. Chap. IV. s. 4.

Forms of action in which relief is granted.

The purchaser can recover the deposit as follows:—

(1) By an action for the return of the deposit: *Clarke* v. *Willott*, L. R. 7 Ex. 313; *Want* v. *Stallibrass*, L. R. 8 Ex. 175; *Weston* v. *Savage*, 10 Ch. D. 736.

(2) By an action for rescission of the contract with consequential relief: *Torrance* v. *Bolton*, L. R. 8 Ch. 118.

(3) On the dismissal of the purchaser's action for specific performance, see *Howe* v. *Smith*, 27 Ch. D. 89, 95. *Secus* before the Judicature Act, *Williams* v. *Edwards*, 2 Sim. 78.

(4) When the vendor's action for specific performance is dismissed: *Turner* v. *Marriott*, L. R. 3 Eq. 744. See *Graves* v. *Wright*, 2 Dru. & War. 77; *Lord Anson* v. *Hodges*, 5 Sim. 227; *Webb* v. *Kirby*, 7 De G. M. & G. 376; *Sheard* v. *Venables*, 15 W. R. 1166.

(5) When the vendor's action for damages is dismissed: *Brewer* v. *Broadwood*, 22 Ch. D. 105.

In actions by the vendor the purchaser should counterclaim for the return of his deposit. See R. S. C. Ord. XXI. rr. 10, 11, 15, 16. But the cases cited show that the Court has jurisdiction to make the order independently of the form of pleading.

Lien for deposit.

In addition to the personal remedy against the vendor, a purchaser has a lien on the estate for the amount of the deposit, and may actively enforce such lien by an action for sale: *Wythes* v. *Lee*, 3 Drew. 396; *Rose* v. *Watson*, 10 H. L. C. 672; *Turner* v. *Marriott*, L. R. 3 Eq. 744. But if the failure of the contract arises from the fact that the vendor has not a good title, or is a trustee not empowered to sell, the lien can only attach to such beneficial interest as the vendor may have: *Wythes* v. *Lee*, *supra*. See also *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101.

Exceptions.

A purchaser who himself abandons the contract cannot claim a lien for the deposit: *Dinn* v. *Grant*, 5 De G. & S. 451. Nor does the lien arise when the right to recovery of the money

Chap. IV. s. 4.

rests upon a purely legal demand, as—(a) when there never was a contract: *Sainsbury* v. *Jones*, 5 My. & Cr. 1; (b) when the contract is terminated by one of its own clauses: *Williams* v. *Edwards*, 2 Sim. 78; or (c) when the contract cannot be enforced on the ground of illegality: *Ewing* v. *Osbaldiston*, 2 My. & Cr. 53, 88.

Liquidated damages.

The conditions of sale generally provide that if the purchaser shall fail to complete his contract, or comply with the conditions, his deposit shall be forfeited, and the vendor shall be at liberty to resell the property, and that any deficiency in price occasioned by, and all expenses attending such resale shall be paid by the purchaser, and be recoverable as liquidated damages: Dav. Conv. Vol. 1, 568.

Resale.

If the vendor resells the property under this condition the deposit must be taken into account and set off against the deficiency in price. The vendor can recover under this condition only the difference between the balance of the purchase-money on the first sale, and the amount of the purchase-money on the second sale. The deposit is no doubt forfeited; the purchaser cannot recover it; but the vendor must give credit for it, if he seeks to recover the deficiency on a resale: *Ockenden* v. *Henly*, E. B. & E. 485. A resale by the vendor after the contract has been abandoned gives the former purchaser no right to the deposit: *Howe* v. *Smith*, 27 Ch. D. 89, 105.

At an advance.

If the property is resold at an advanced price, the purchaser who had violated his agreement cannot call for an account of the surplus: *Ex parte Hunter*, 6 Ves. 94, 97.

At a loss.

If, on the other hand, the deficiency in price, together with the expenses of the second sale, exceed the amount of the deposit, the vendor has a right of action in respect of the difference; and a provision that the deposit shall be "forfeited as liquidated damages" does not qualify the right of the vendor to full damages for a wrongful abandonment of the contract: *Icely* v. *Grew*, 6 N. & M. 467. See also *Hinton* v. *Sparkes*, L. R. 3 C. P. 161.

Bankruptcy of purchaser.

The vendor has a right to prove in the bankruptcy of the purchaser for any damages arising under this condition (*Ex parte Hunter*, 6 Ves. 94); and under the present law whether

they be liquidated or unliquidated: see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37.

It seems that, in the absence of express stipulation, the measure of damages for breach of contract to purchase will include, as one item, the loss on a resale: *Noble* v. *Edwardes*, 5 Ch. D. 378.

No resale.

The vendor is not bound under such a condition to resell the property, and it has been held that, where the sale proved abortive through the default of the purchaser, the vendor was entitled to recover the expenses which he had incurred through that default: *Essex* v. *Daniell*, L. R. 10 C. P. 538. This case appears to have been decided without reference to the special condition as to the recovery of the expenses which was included in the contract.

Time when purchaser may bring action for deposit.

Where it was agreed that if either party should refuse or neglect to perform his part of the agreement he should pay to the other a fixed sum as damages, and, in case of default by the purchaser, the deposit-money should be forfeited in part of such damages, and the vendor's title was bad, the purchaser was held entitled to the repayment of the deposit, with interest, and to have been justified (time being of the essence) in repudiating the contract and issuing his writ before the day fixed for completion: *Weston* v. *Savage*, 10 Ch. D. 736. But where time is not of the essence of the contract, the purchaser ought not, when the vendor fails to complete on the day fixed, to bring an action for the recovery of the deposit, immediately after the time fixed for completion. His proper course is to give notice to the vendor to complete within a reasonable time. If he fails to do this, and the vendor subsequently is in a position to complete, the purchaser's action will be dismissed: *Patrick* v. *Milner*, 2 C. P. D. 342.

Condition as to return of deposit without interest.

A condition, that if any purchaser should make any objection or requisition which the vendor should be unable or unwilling to remove, it should be lawful for the vendor to rescind the contract, and that, in that case, the purchaser should be entitled to a return of his deposit without interest, does not entitle the vendor to retain the deposit as long as he pleases while he is

Chap. IV. s. 4.

making fruitless efforts to remove the difficulty: *M'Culloch* v. *Gregory*, 1 K. & J. 286.

So, notwithstanding a condition for the return of the deposit without interest, a vendor who brings an action for specific performance and fails, may be ordered to pay interest on the deposit; for, having submitted to the jurisdiction, he will be compelled to do what is equitable, independently of the terms of the contract: *Sheard* v. *Venables*, 15 W. R. 1166.

A purchaser, it may be observed, has no right to say that he will put an end to the agreement, forfeiting his deposit: *Crutchley* v. *Jerningham*, 2 Mer. 502, 506; *Palmer* v. *Temple*, 9 Ad. & E. 508, 520.

CHAPTER V.

SALES AND PURCHASES BY TRUSTEES.

SECT.		PAGE
1.	*Trustees for Sale*	121
	i. *Bare power and power annexed to estate*	121
	ii. *Survivorship and assignment of powers*	122
	iii. *Consents*	125
	iv. *Manner of Sale*	127
	v. *Time for sale*	130
	vi. *When beneficiaries are absolutely entitled*	132
2.	*Purchase of Trust Property by the Trustee*	134
	i. *From himself*	134
	ii. *From his cestui que trust*	134
	iii. *Purchase by executor*	136
	iv. *Purchase by agent for sale*	137
	v. *Purchase by solicitor from client*	137
2.	*Purchase, &c.*—continued.	
	vi. *Remedies of cestui que trust*	139
	vii. *Acquiescence and confirmation*	140
3.	*Sale by Tenant for Life under Settled Land Act, 1882*	141
4.	*Sale by Executors for Payment of Debts*	145
5.	*Sale by Mortgagee*	147
	i. *To what extent mortgagee is a trustee*	147
	ii. *His power of sale*	148
	iii. *May not sell to himself*	152
	iv. *May purchase from mortgagor*	153
6.	*Sale by Trustee in Bankruptcy*	154
7.	*Sale by Trustees of a Charity*	155
8.	*Purchases by Trustees*	156

SECT. 1.—*Trustees for Sale.*

THERE is a distinction between the position of persons to whom a mere power of selling land is given, uncoupled with any estate in the land, and that of persons in whom the estate is vested upon trust for sale, or with a power of sale.

Bare power and power annexed to estate.

With regard to the former case, that of persons to whom a power is given without any estate, it is to be observed that such power can only be exercised by the persons actually authorized. Thus, if a power is given to several persons by name, the survivors cannot sell, unless it is so expressed in the instrument; nor can the heir or legal personal representatives of the survivor.

Bare power does not survive unless so expressed.

Chap. V. s. 1.

If the power is given to them in their collective capacity of trustees, as, to "my trustees," they can sell so long as there are two of them remaining. If the power is given to executors it can be exercised by the survivor, unless, perhaps, it is given to them *nominatim*, or there is something in the will to show that a joint exercise only was contemplated. If the power to sell is given to the executors by implication of law, it can be exercised by the surviving executor. See Sug. V. & P. 128.

Power to trustees to preserve contingent remainders.

A power of sale given to trustees to preserve contingent remainders seems to be a bare power, and it was held that such a power could not, unless expressly given to survivors, be exercised after the death of one of the trustees: *Townsend* v. *Wilson*, 1 B. & Ald. 608.

It has been doubted whether a bare power is included in the 38th section of the Conveyancing Act, 1881, so as to survive in the case of instruments coming into operation after the commencement of the Act. But, inasmuch as that section makes no change in the law with regard to powers annexed to the estate, it is difficult to give any reason why otherwise it is confined to future instruments.

Disclaimer of bare power.

The rule that a bare power can only be exercised by the persons strictly authorized, also applies where one of the trustees has disclaimed.

Powers annexed to estate survive with the estate.

Powers annexed to an estate survive with the estate, therefore the surviving trustee can sell, although the power is not expressly conferred on the survivor. See Lewin, Trustees, pp. 238, 528, 7th ed.; Conveyancing Act, 1881, s. 38.

It makes no difference as to survivorship of powers whether the estate is vested in the trustees upon trust to sell, as in *Jones* v. *Price*, 11 Sim. 557; *Lane* v. *Debenham*, 11 Hare, 188; or whether the estate is vested in them, and a power of selling is conferred upon them, as in *Re Cookes' Contract*, 4 Ch. D. 454.

The reason for the distinction between the survivorship of a bare power and of a power annexed to an estate is to be found at p. 192 of the judgment in *Lane* v. *Debenham*, 11 Hare, 188. "The ground of that rule is, that, where the testator has disposed of his property in one direction, subject to a power in two or more persons enabling them to divert it in another direction,

the property will go as the testator has first directed, unless the persons to whom he has given the power of controlling the disposition exercise that power. He therefore to whom the testator has given the property, subject to having it taken from him by the exercise of the power, has a right to say that it must be exercised *modo et formâ*. It is therefore a rule of law, that in all cases of powers the previous estate is not to be defeated unless the power be exercised in the manner specifically directed. When, on the other hand, a testator gives his property, not to one party subject to a power in others, but to trustees upon special trusts, with a direction to carry his purposes into effect, it is the duty of the trustees to execute the trust."

Disclaimer of power and estate.

The rule is the same where one of the trustees to whom the estate was given has disclaimed; that is to say, those who accept can sell: *Crewe* v. *Dicken*, 4 Ves. 97; *Adams* v. *Taunton*, 5 Mad. 435. If, however, all the trustees disclaim, the heir-at-law of the testator cannot exercise the power of selling: *Robson* v. *Flight*, 4 De G. J. & S. 608.

Where all the trustees are dead.

The greatest difficulty has generally arisen in cases where none of the trustees are remaining. Of course where it is a bare power no one, except the persons specially authorized by the instrument, can exercise it: see p. 121. Where, however, the estate was vested in the trustees and they are all dead, the question arises whether the heir, the devisee or the legal personal representative of the survivor is the proper person to exercise the power and convey the estate.

It will be convenient first to consider the question independently of legislative enactments, and then to notice the effect which recent statutes have had upon the law.

Power given to heirs and assigns of surviving trustee.

Where an estate was vested in trustees and a power of sale was given "to them and the survivor of them, his heirs and assigns," after the death of the surviving trustee, his heir or devisee, as the case might be, could sell and convey: *Titley* v. *Wolstenholme*, 7 Beav. 425; *Hall* v. *May*, 3 K. & J. 585.

Power given to the heirs of the surviving trustee.

Where the power was extended to the heirs, but not to the assigns of the survivor, it was held in *Cooke* v. *Crawford* (13 Sim. 91), that the devisee of the surviving trustee could not sell. The late Master of the Rolls, however, in *Osborne to Rowlett* (13

Chap. V. s. 1.

Ch. D. 774), where the power was given to the trustees and their heirs, which was considered equivalent to the words in *Cooke* v. *Crawford*, held that the devisee of the survivor could make a good title. The learned judge went very carefully through the authorities, and came to the conclusion that *Cooke* v. *Crawford* could not be considered as law.

Power given to trustees for time being.

In the case of *Re Morton and Hallett* (15 Ch. D. 143), where the power was given to the "trustees or trustee for the time being," and the surviving trustee died intestate, it was held by Jessel, M. R., and by the Court of Appeal, that his heir could make a good title. The Court of Appeal, however, expressly stated that *Cooke* v. *Crawford* must not be considered as being overruled by *Osborne to Rowlett*.

The result therefore, so far as the authorities are concerned, seems to be that a purchaser could take a title from the heir or devisee, as the case might be, of the surviving trustee, where the power was extended to the heirs and assigns. Where the power was not extended to the assigns, and the surviving trustee had nevertheless devised the estate, the purchaser could not be advised to take a title from the devisee (*Bradford* v. *Belfield*, 2 Sim. 264; *Macdonald* v. *Walker*, 14 Beav. 556; *Ashton* v. *Wood*, 3 Sm. & G. 436); and the heir of the surviving trustee was also unable to sell because he had not the estate. Even if the heir and the devisee joined, it seems that the title would still have been doubtful; see *Wilson* v. *Bennett* (5 De G. & S. 475), where one of the devisees was also the heir of the surviving trustee.

Enactments as to devolution of trust estate.

The existing law upon this point has been still further complicated by legislative amendments. The several enactments are dealt with at length in Ch. XXI., *post*, p. 283. The following is a summary of them so far as they affect trust estates:—

1. If the surviving trustee died before the 7th August, 1874, the legal estate passed to his heir-at-law or devisee, as the case might be.

2. If he died on or after the 7th August, 1874, and before the 1st January, 1876, whether testate or intestate, the legal estate, if he was a bare trustee, vested in his legal personal representative. See sect. 5 of the Vendor and Purchaser Act,

1874. This section was repealed, except as to anything already done under it, by sect. 48 of the Land Transfer Act, 1875.

3. If he died on or after the 1st January, 1876, and before the 1st of January, 1882, the legal estate vested in his devisee, if any, and if none in his legal personal representative. See the Land Transfer Act, s. 48.

4. If he died on or after the 1st January, 1882, the legal estate, notwithstanding any testamentary disposition, vested in his legal personal representatives from time to time, and they are to be deemed in law his heirs and assigns within the meaning of all trusts and powers. See Conveyancing Act, 1881, s. 30.

From this last section it seems that when the surviving trustee died after the commencement of the Conveyancing Act, his legal personal representative can exercise the power of sale and can convey the estate, whether the power given by the instrument creating the trust is given to the heirs and assigns of the surviving trustee or confined to one or the other.

Powers of new trustees.

Before Lord Cranworth's Act, even trustees who had been appointed by the Court were held unable to exercise the powers of the settlement (see *Fordyce* v. *Bridges*, 10 Beav. 90; 2 Ph. 497; *Newman* v. *Warner*, 1 Sim. N. S. 457); unless they came within the words of the trust, as in *Bartley* v. *Bartley* (3 Drew. 384), where the power was given to the trustees or trustee for the time being. This was provided for by the 27th section of the above-mentioned Act (23 & 24 Vict. c. 145), which gives to all new trustees the same powers as if they had been originally nominated trustees by the deed. And see Conveyancing Act, 1881, sect. 31, sub-sect. 5.

Consents.

Trustees who can only sell with the consent of some person should obtain that consent before they enter into the contract: *Adams* v. *Broke*, 1 Y. & C. C. 627; *Sykes* v. *Sheard*, 2 De G. J. & S. 6; *Phillips* v. *Edwards*, 33 Beav. 440.

Consent by tenant for life.

The consent of the tenant for life is, by sect. 56, sub-sect. 2, of the Settled Land Act, 1882, made necessary to the exercise of the power of sale by the trustees, notwithstanding anything in the settlement. And where several persons together constitute the tenant for life within the meaning of the Settled Land Act,

Chap. V. s. 1.

1882, the consent of one of them is, so far as sect. 56 of that Act is concerned, made sufficient by sect. 6, sub-sect. 2, of the Settled Land Act, 1884.

Whether power to consent is lost by alienation.

The question frequently arises whether, where the person to consent has parted with his interest, he can afterwards exercise his power to consent. It seems to be settled that he can. Thus, in *Morgan* v. *Rutson* (16 Sim. 234), a tenant for life who had released his life estate to his son was held still able to consent to a sale by the trustees. In *Re Wright's Trustees and Marshall* (28 Ch. D. 93), the estates had been resettled and the existing life estate postponed to certain charges, the powers in the former settlement being expressed to be kept alive; it was held that the power of the tenant for life to consent to a sale according to the powers of the former settlement was not destroyed. Still less will the mere fact that the tenant for life has concurred as protector of the settlement in a disentailing deed by the tenant in tail operate as a bar to his power of consenting to a sale: *Hill* v. *Pritchard*, Kay, 394.

But he cannot exercise the power in derogation of the alienee's estate. Therefore if he has sold his own life estate the concurrence of the purchaser must also be obtained to a sale of the property: *Alexander* v. *Mills*, L. R. 6 Ch. 124; and see *Mostyn* v. *Lancaster*, 23 Ch. D. 583. So if he has become bankrupt his trustee must concur: *Holdsworth* v. *Goose*, 29 Beav. 111; *Eisdell* v. *Hammersley*, 31 Beav. 255; and see *Leigh* v. *Ashburton*, 11 Beav. 470.

If, however, the conveyance of the life interest to the purchaser shows that the property was intended to retain its convertible quality, the concurrence of the alienee is not necessary: *Warburton* v. *Farn*, 16 Sim. 625; and see *Hardaker* v. *Moorhouse*, 26 Ch. D. 417.

Notice.

Trustees authorized to sell after giving notice to some person must give such notice before proceeding to exercise the power: *Tommey* v. *White*, 3 H. L. C. 49.

Under a trust for sale.

Where land is vested in trustees, upon trust to sell, and the purchase-money is directed to be held upon trust for any person for life, although such land is settled land within the Settled Land Act, 1882 (see s. 63), yet the consent of the person entitled

for life is not necessary, unless required by the terms of the settlement. See Settled Land Act, 1884, s. 6, sub-s. 1.

This last-mentioned section is retrospective (sub-s. 3), and therefore renders it unnecessary to consider the decisions in *Re Earle and Webster's Contract*, 24 Ch. D. 144, and *Taylor* v. *Poncia*, 25 Ch. D. 646.

Public auction or private contract.

Unless otherwise directed, trustees are justified in selling, either by public auction or private contract, and in lots or otherwise, as they think most likely to obtain the best price: *Ord* v. *Noel*, 5 Mad. 438; and see Sug. V. & P. 60, 61; Conveyancing Act, 1881, s. 35. They may fix a reserved bidding (*Re Peyton's Settlement*, 30 Beav. 252); and if no one bids up to the reserved price at the auction, they may afterwards sell at that price by private contract: *Bousfield* v. *Hodges*, 33 Beav. 90.

Under a direction to sell by public auction, a trustee must not sell by private contract: *Daniel* v. *Adams*, Amb. 495; and see *Bulteel* v. *Lord Abinger*, 6 Jur. 410.

A request to an agent to procure a purchaser, and to advertise the property at a certain price, does not authorize him to enter into a contract for sale: *Hamer* v. *Sharp*, L. R. 19 Eq. 108; and see *Wilson* v. *West Hartlepool Rail. Co.*, 2 De G. J. & S. 475.

Open contract.

Trustees are not justified in entering into an open contract for sale (*John* v. *Jones*, 34 L. T. 570); but if they sell under conditions of sale which are of a nature to deter purchasers, the Court will not, if the state of the title or property is not such as to render the conditions necessary, assist the purchaser in obtaining specific performance.

Too short title.

Thus, specific performance will be refused if the trust property is put up with a shorter title than necessary (*Dance* v. *Goldingham*, L. R. 8 Ch. 902), unless the value is small, when a shorter title may be justified on the ground of expense, see *Dunn* v. *Flood*, 28 Ch. D. 586. So, if the sale is made subject to all easements and other burdens, if any, and no provision is made for compensation: *Dunn* v. *Flood*, *ubi supra*.

Put up with other property.

If the trustees put up for sale their property in conjunction with other property not belonging to the trust, without due precautions that the price is not thereby prejudicially affected,

Chap. V. s. 1.

specific performance will be refused. Thus, if the other property has a shorter title, it should be made clear that the short title does not extend to any portion of the trust property (*Rede* v. *Oakes*, 4 De G. J. & S. 505); or, if on such a sale as last mentioned no proper provision is made for apportioning the purchase-money (*Ibid.*; and see *Cavendish* v. *Cavendish*, L. R. 10 Ch. 319); but it seems that the method of apportionment need not be stated by the contract, provided the apportionment can be properly made before the completion of the purchase: *Morris* v. *Debenham*, 2 Ch. D. 540; and as to the mode of valuation where a life estate and remainder are sold together, see *Re Cooper and Allen's Contract*, 4 Ch. D. 802.

The same trustees of two contiguous estates held upon different trusts are not justified in granting one lease of the mines under the two estates with rents and royalties reserved as if they were one estate; and *quære* whether in any case a lease by trustees by one demise of two estates held upon distinct trusts would not be a breach of trust: *Tolson* v. *Sheard*, 5 Ch. D. 19.

Common conditions.

The condition of sale dispensing with the concurrence of beneficiaries is not of itself depreciatory: *Groom* v. *Booth*, 1 Drew. 548; *Wilkinson* v. *Hartley*, 15 Beav. 183.

The usual conditions as to time, rescission of sale, forfeiture of deposit and resale, are not improper conditions for fiduciary vendors: *Hobson* v. *Bell*, 2 Beav. 17; *Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352; *Hoy* v. *Smythies*, 22 Beav. 510.

Condition for compensation.

The condition allowing compensation for misdescription may be used by trustees: see *Dunn* v. *Flood*, 28 Ch. D. 586. This condition will be enforced against them where the property turns out to be less valuable than described (*Hill* v. *Buckley*, 17 Ves. 394; *Crompton* v. *Melbourne*, 5 Sim. 353; and see *Barker* v. *Cox*, 4 Ch. D. 464); and the same rule applies to the case of a mortgagee selling: *Hobson* v. *Bell*, 2 Beav. 17. These cases are quite different from *Mortlock* v. *Buller* (10 Ves. 292), and *White* v. *Cuddon* (8 Cl. & Fin. 766), where the vendors, being trustees, had sold under particulars understating the value of the property to such an extent as to amount to a breach of

trust, and the Court would not enforce specific performance against them.

Special conditions under Acts.

Sect. 3 of the Vendor and Purchaser Act, 1874, sects. 35, 66 of the Conveyancing Act, 1881, and sect. 4 of the Settled Land Act, 1882, do not seem to affect the law as laid down in the cases cited above. Nor would the ordinary power given by settlement or will to trustees to sell under such special conditions as to title or otherwise, as they think fit, render a sale valid when the conditions were improperly depreciatory.

Trustees may employ agents.

Trustees may employ proper persons to value the property and to conduct the sale: *Conolly* v. *Parsons*, 3 Ves. 625, *n.*; *Campbell* v. *Walker*, 5 Ves. 678. But they ought, apparently, themselves to appoint the valuers and not to leave it entirely to their solicitors, though they may appoint the persons their solicitors recommend: *Fry* v. *Tapson*, 28 Ch. D. 268.

They are not liable if the auctioneer fails to pay over the deposit, unless they themselves are negligent in allowing it to remain unduly in his hands: *Edmonds* v. *Peake*, 7 Beav. 239; and see *Rowe* v. *May*, 18 Beav. 613.

Trustees should adopt all proper means for obtaining the best price, such as advertising: *Ord* v. *Noel*, 5 Mad. 438; and see *Oliver* v. *Court*, 8 Pri. 127, 165. But when once they have entered into a contract, it will not be set aside merely on the ground that some other person is prepared to give more: *Goodwin* v. *Fielding*, 4 De G. M. & G. 90; *Harper* v. *Hayes*, 2 De G. F. & J. 542; and see *Selby* v. *Bowie*, 4 Giff. 300.

Timber.

On a sale by trustees, in estimating the price, the land and timber may be valued separately, see Sug. Pow. 866. But the tenant for life, even if unimpeachable for waste, has no right to receive the purchase-money for timber: *Cockerell* v. *Cholmeley*, 1 Cl. & Fin. 60; and see *Davies* v. *Wescomb*, 2 Sim. 425. When, however, this has been by mistake permitted, a remedy has to some extent been provided by 22 & 23 Vict. c. 35, s. 13, under which the sale may be established, but the purchaser may have to pay the value of the timber over again.

Minerals.

Formerly, trustees with a power of sale could not sell the land and minerals separately: *Buckley* v. *Howell*, 29 Beav. 546. This has, however, been remedied by statute. See 25 & 26 Vict.

Chap. V. s. 1.

c. 108; Settled Estates Act, 1877, s. 19; Settled Land Act, 1882, s. 17.

Whether power of sale authorizes mortgage;

A power of sale does not authorize a mortgage (*Haldenby* v. *Spofforth*, 1 Beav. 390; *Page* v. *Cooper*, 16 Beav. 396; *Devaynes* v. *Robinson*, 24 Beav. 86), unless the power is given merely for the purpose of raising a particular charge, and subject to that charge the estate is settled: *Stroughill* v. *Anstey*, 1 De G. M. & G. 635. A power to raise a sum of money out of an estate authorizes a sale or mortgage: see Sug. Pow. p. 425; *Marshall* v. *Sladden*, 7 Hare, 428. Trustees who are directed to sell property which is in mortgage, and out of the proceeds of sale to pay off the mortgage, may sell subject to the mortgage: *Manser* v. *Dix*, 8 De G. M. & G. 703.

or partition;

A power of sale and exchange authorizes a partition (*Re Frith and Osborne*, 3 Ch. D. 618); but a power of sale only does not: *McQueen* v. *Farquhar*, 11 Ves. 467; *Brassey* v. *Chalmers*, 4 De G. M. & G. 528; and see *Bradshaw* v. *Fane*, 3 Drew. 534.

or lease.

Trustees for sale are not, as a rule, capable of granting a lease of the property; but there may be special circumstances to justify such a course: *Evans* v. *Jackson*, 8 Sim. 217; and see *Keating* v. *Keating*, Ll. & G. t. Sug. 133; *Hackett* v. *McNamara*, Ll. & G. t. Plunk. 283; *Law* v. *Urlwin*, 16 Sim. 377.

Option to purchase at future time.

Trustees may not give an option to purchase at a future time at a fixed sum: *Clay* v. *Rufford*, 5 De G. & S. 768. Nor may an executor or administrator, even though it may be advantageous to the estate: *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236.

Power of sale does not infringe rule against perpetuities.

A power or trust for sale not limited in point of time does not infringe the rule against perpetuities, whether such power be contained in a settlement with limitations in tail (*Biddle* v. *Perkins*, 4 Sim. 135; *Cole* v. *Sewell*, 4 Dru. & War. 1, 32), whatever doubts may have been suggested in *Ware* v. *Polhill* (11 Ves. 257); or whether such power be contained in a settlement with limitations in fee: *Nelson* v. *Callow*, 15 Sim. 353; *Lantsbery* v. *Collier*, 2 K. & J. 709; and see *Re Cotton's Trustees*, 19 Ch. D. 624, 629; *Re Tweedie and Miles*, 27 Ch. D. 315.

Time for sale specified in the trust.

Trustees who are by the instrument creating the trust directed to sell at any particular time cannot sell before that time has

arrived (*Blacklow* v. *Laws*, 2 Hare, 40; *Leedham* v. *Chawner*, 4 K. & J. 458); even though it would be for the advantage of the *cestuis que trust*: *Johnstone* v. *Baber*, 8 Beav. 233. And the Court has no jurisdiction to authorize such a sale (*Ibid.*), unless under the provisions of some Act of Parliament, as the Settled Estates Act, 1877: *Re Morgan's Settled Estate*, L. R. 9 Eq. 587; *Re Evans' Settlement*, 14 Ch. D. 511; but see *Swaine* v. *Denby*, 14 Ch. D. 326. It has jurisdiction to authorize the postponement of a sale beyond the time declared by the trust, where a literal compliance would be mischievous: *Cuff* v. *Hall*, 1 Jur. N. S. 972; *Morris* v. *Morris*, 4 Jur. N. S. 802; and see *Pearce* v. *Gardner*, 10 Hare, 287.

With regard to sales directed to be made after the death of the tenant for life, it is to be remembered that, though the trustees may not be able to effect a sale during his life even with his consent, he can himself sell under the provisions of the Settled Land Act, 1882: *Wheelwright* v. *Walker*, 23 Ch. D. 752.

Direction to sell if necessary.

Under a direction to trustees to sell within fifteen years, if in their opinion a sale should be necessary for discharge of incumbrances, the purchaser need not inquire whether a sale is necessary, or whether more has not been sold than is required: *Lord Rendlesham* v. *Meux*, 14 Sim. 249.

Where no time is fixed

Where no time is specified for the sale, or the trustees are only directed to sell "with all convenient speed," they can exercise their discretion as to the time at which they will sell, having regard on the one hand to obtaining the best price, and on the other hand to the rights of the beneficiaries; see *Marquis Camden* v. *Murray* (16 Ch. D. 161), where the Court declined to interfere with their discretion by compelling a sale; *Thomas* v. *Williams* (24 Ch. D. 558), where the Court declined to restrain a sale.

So far as the purchaser is concerned, the power of sale or trust for sale continues until it is put an end to by subsequent events, as by the beneficiaries becoming absolutely entitled, or electing to take the property as real estate: see next page. The trustees can, until that has happened, make a perfectly good title and convey the property to the purchaser: *Taite* v. *Swinstead*, 26 Beav. 525; *Re Brown's Settlement*, L. R. 10 Eq. 349; and see *Walker* v.

Chap. V. s. 1.

Shore, 19 Ves. 387; *Fry* v. *Fry*, 27 Beav. 144. And even where the direction was to sell with all convenient speed and within five years, it was held that the trustees could sell after the five years had elapsed: *Pearce* v. *Gardner*, 10 Hare, 287.

Depreciation where sale postponed.

As between the trustees and the *cestuis que trust*, trustees who unduly postpone the sale may be held liable for depreciation in value: *Taylor* v. *Tabrum*, 6 Sim. 281; *Devaynes* v. *Robinson*, 24 Beav. 86; *Fry* v. *Fry*, 27 Beav. 144. See, however, *Selby* v. *Bowie*, 4 Giff. 300; *Marsden* v. *Kent*, 5 Ch. D. 598.

After decree.

After a decree for execution of the trusts of the settlement the trustees cannot sell except under the order of the Court: *Annesley* v. *Ashurst*, 3 P. Wms. 282; *Walker* v. *Smalwood*, Amb. 676. But a mere sanction by the Court on behalf of infants of a compromise, under which it is agreed to sell the estates, does not make it a sale by the Court: *Bousfield* v. *Hodges*, 33 Beav. 90.

Power of sale when beneficiaries become absolutely entitled.

The question not unfrequently arises, where trustees have a power of sale, whether that power is gone so soon as all the beneficiaries become absolutely entitled to the property or the proceeds of sale. It is clear that, so long as any of the trusts of any of the shares remain to be performed, the power is still subsisting (*Taite* v. *Swinstead*, 26 Beav. 525); and it makes no difference if the trusts of the shares are declared by a deed of appointment made under a power conferred by the settlement: *Re Brown's Settlement*, L. R. 10 Eq. 349.

Trust for sale.

Further, where property is vested in trustees upon trust to sell the trust still exists, although the beneficiaries are absolutely entitled to the proceeds and *sui juris*. In such a case, it has been held that the trustee can sell and make a good title until the beneficiaries have required him to convey to them, and presumably until he has actually done so: *Re Tweedie and Miles*, 27 Ch. D. 315.

Power of sale.

Where, however, all the uses and purposes of the settlement are at an end, a power of sale (as distinguished from a trust for sale), which subsists only for the purposes of the settlement, is altogether gone: *Wolley* v. *Jenkins*, 23 Beav. 53.

Intention of settlor.

It has indeed been held, that if it can be gathered from the instrument that the settlor intended the power of sale to remain

for any purpose after the property has become legally and equitably vested in any person, then the trustees can sell: *Lantsbery* v. *Collier*, 2 K. & J. 709; in which case, Wood, V.-C., apparently considered that the conversion of realty into personalty was itself the purpose for which the power of sale was given. In *Re Cotton's Trustees* (19 Ch. D. 624), where a building estate was devised unto and to the use of trustees, with powers of managing and a power to sell within a definite period, the power to sell was held to be still subsisting, although the beneficial interest in the property had become absolutely vested in eight persons before the expiration of the period. Fry, J., in deciding that case, said (p. 627): "It is well ascertained, that where there is a settlement of real estate, either by will or by deed, and the settlement ultimately carries the land to a person entitled in fee simple, and there are powers couched in general words, and without limitation as to time, which are nevertheless obviously intended to be exercised only during the subsistence of the intermediate limitations, there, the moment the estate in fee is vested, the powers are at an end." See also *Re Cookes' Contract*, 4 Ch. D. 454; *Peters* v. *Lewes Ry. Co.*, 18 Ch. D. 429.

Trustees with legal estate.

It is to be observed that in these last three cases the trustees took the legal estate, which would pass by their conveyance to the purchaser.

Trustees without legal estate.

Where, however, the legal and equitable estates are both vested absolutely in any person or persons, and the trustees have merely a power of sale, with power of revoking and appointing the uses, it is clear that a purchaser could not safely complete without the concurrence of the persons entitled, because they might already have put an end to the power by electing to take the property in its unconverted state. See also remarks of Jessel, M. R., in *Peters* v. *Lewes Ry. Co.*, 18 Ch. D. 437.

Specific performance refused where sale is a breach of trust.

Wherever trustees are selling in such a manner as to constitute a breach of trust, the purchaser cannot compel specific performance: *Mortlock* v. *Buller*, 10 Ves. 292; *Ord* v. *Noel*, 5 Mad. 438; *White* v. *Cuddon*, 8 Cl. & F. 766.

Sect. 2.—*Purchase of Trust Property by the Trustee.*

Trustee cannot safely sell to himself.

Under no circumstances whatever can a trustee for sale safely purchase the property from himself, even at an auction (*Ex parte Lacey*, 6 Ves. 625; *Hamilton* v. *Wright*, 9 Cl. & Fin. 111; *Ingle* v. *Richards*, 28 Beav. 361); and it makes no difference if he purchases through an agent: *Whichcote* v. *Lawrence*, 3 Ves. 740; *Campbell* v. *Walker*, 5 Ves. 678; *Sanderson* v. *Walker*, 13 Ves. 601; *Randall* v. *Errington*, 10 Ves. 423.

Sale set aside.

It is not that he is incapable of selling the property to himself, but however fair the transaction it will be set aside if the *cestui que trust* applies within a reasonable time: *Campbell* v. *Walker*, 5 Ves. 678; and see *post*, p. 140.

One of several trustees.

Where there are several trustees for sale they cannot sell to one of their number: *Whichcote* v. *Lawrence*, 3 Ves. 740; and see *Hall* v. *Noyes*, 3 Bro. C. C. 483.

Trustee who has disclaimed.

But the rule does not apply to a trustee who has never acted, even though he has not executed a deed of disclaimer, which is the prudent course to adopt if he desires to purchase the property: *Stacey* v. *Elph*, 1 My. & K. 195; and see *Chambers* v. *Waters*, 3 Sim. 42; *Clark* v. *Clark*, 9 App. Cas. 733. Nor does it apply to a mere trustee to preserve contingent remainders: *Parkes* v. *White*, 11 Ves. 209, 226; and see *Pooley* v. *Quilter*, 4 Drew. 184, 189; 2 De G. & J. 327.

Trustee buying back from purchaser.

And if the trustee has sold the property to a stranger, there is nothing to prevent him from subsequently buying it back, provided the two sales are quite independent and *bonâ fide*: *Baker* v. *Peck*, 9 W. R. 472; *Dover* v. *Buck*, 5 Giff. 57.

Purchase by trustee from *cestui que trust*.

A trustee is not precluded from purchasing the trust property from his *cestui que trust*: *Coles* v. *Trecothick*, 9 Ves. 234. "But, though permitted, it is a transaction of great delicacy, and which the Court will watch with the utmost diligence; so much that it is very hazardous for a trustee to engage in such a transaction. . . . A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving that the *cestui que trust* intended the

trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee:" per Lord Eldon, *ibid.*, pp. 244, 246; and see *Ex parte Lacey*, 6 Ves. 625; *Morse* v. *Royal*, 12 Ves. 355; *Downes* v. *Grazebrook*, 3 Mer. 200.

Onus of proof.

In fact, wherever the trustee has purchased from his *cestui que trust*, he must be prepared, if within a reasonable time the transaction is called in question by the *cestui que trust*, to show its fairness. The burden lies upon him of proving that the bargain was as good as any that could have been obtained, and not upon the *cestui que trust* of proving the contrary (*Pisani* v. *A.-G. for Gibraltar*, L. R. 5 P. C. 516; and see *Lowther* v. *Lowther*, 13 Ves. 95, 103; *Murphy* v. *O'Shea*, 2 J. & L. 424; *Waters* v. *Thorn*, 22 Beav. 547; *Denton* v. *Donner*, 23 Beav. 285; *Luff* v. *Lord*, 34 Beav. 220); unless the *cestui que trust* has acquiesced for a long time, see *post*, p. 140.

The mere uncorroborated statement of the trustee as to the fairness of the transaction, contradicted by the other side, is not sufficient to support the sale: *Dunne* v. *English*, L. R. 18 Eq. 524, and cases there cited.

Trustee retiring with a view to purchase.

If the Court comes to the conclusion that the transaction was not fair, it will not be prevented from setting aside the sale by the fact that the trustee had retired from the trust with a view to making the purchase: *Spring* v. *Pride*, 4 De G. J. & S. 395.

By trustee who was also solicitor.

A purchase from his *cestui que trust* by the trustee who was also his solicitor was upheld where he had failed to meet with any other purchaser, and the transaction had been fairly carried out: *Clarke* v. *Swaile*, 2 Ed. 134.

By trustee who was also agent for purchaser.

A sale by a devisee in trust for sale of part of the property to the trustees of his own marriage settlement, for whom he also instructed an agent to bid, was, under the circumstances, upheld: *Hickley* v. *Hickley*, 2 Ch. D. 190; cf. *Ex parte Bennett*, 10 Ves. 381.

Unfair advantage.

But if the trustee effects the purchase by taking any unfair advantage of the confidence reposed in him by the settlor, the sale will be set aside, or he will be declared to be a trustee for

Chap. V. s. 2.

the settlor as to any money he may have gained over and above the price he paid: *Fox* v. *Mackreth*, 2 Bro. C. C. 400; 2 Cox, 320; Wh. & Tud. L. C. Vol. I. 123.

Purchaser with notice from trustee.

If the trustee, having improperly purchased, sells to a purchaser who has notice of the circumstances, such purchaser will be equally liable to have his purchase set aside: *Dunbar* v. *Tredennick*, 2 Ball & B. 304; *Att.-Gen.* v. *Lord Dudley*, Coop. 146; *Spencer* v. *Topham*, 22 Beav. 573.

Third parties cannot raise objection.

If a trustee purchases the trust property and brings an action against third parties to enforce his rights, such parties cannot raise the objection that the purchase was an improper one, see *Knight* v. *Bowyer*, 23 Beav. 609; 2 De G. & J. 421; a case of a purchase by a solicitor from his client.

Where *cestuis que trust* are infants.

Where the *cestuis que trust* are infants, the only safe way for a trustee to purchase the property is under the sanction of the Court. See *Walker* v. *Campbell*, 5 Ves. 678; 13 Ves. 601; *Farmer* v. *Dean*, 32 Beav. 327.

Leave to bid.

But a trustee will not be allowed to bid on a sale by the Court if any of the *cestuis que trust* object: *Tennant* v. *Trenchard*, L. R. 4 Ch. 537.

A person in a fiduciary position who has obtained leave to bid, must either abstain from laying any information before the Court in order to obtain its approval, or he must lay before it all the information he possesses, which is material to enable the Court to form a correct opinion: *Boswell* v. *Coaks*, 27 Ch. D. 424.

Executor purchasing from himself.

An executor cannot become the purchaser from himself of any part of the assets of his testator: *Hall* v. *Hallet*, 1 Cox, 134.

Renewing lease.

A trustee taking leasehold property at a valuation, and subsequently renewing, will be held to be a trustee and accountable to the *cestui que trust*: *Killick* v. *Flexney*, 4 Bro. C. C. 161; and see *Keech* v. *Sandford*, 1 Wh. & Tu. L. C. 46.

Executor selling to co-executor.

An executor may purchase from his co-executor, but the onus of proving that he gave full value rests with him: *Kilbee* v. *Sneyd*, 2 Mol. 186, 191; and see *Re Biel's Estate*, L. R. 16 Eq. 577.

As to the sale of a share in a partnership to the surviving partners who are also executors, see *Vyse* v. *Foster*, L. R. 7 H. L. 318; *Cook* v. *Collingridge*, Jac. 607.

Executors who were partners of deceased.

An agent for sale, like a trustee for sale, can himself purchase the property from his principal, but the purchase is liable to be set aside on the like grounds as a purchase by a trustee from his *cestui que trust*: *York Buildings Co.* v. *Mackenzie*, 8 Bro. P. C. 42.

Agent may purchase, but sale liable to be set aside.

Thus, if the agent takes advantage of the negligence and extravagance of the principal (*Watt* v. *Grove*, 2 Sch. & Lef. 492), or being employed to value the estate and sell by auction, values it at too small a sum, and failing to sell, immediately offers to purchase himself at his own valuation (*Oliver* v. *Court*, 8 Pri. 127), the transaction will be set aside.

So, too, the sale will be set aside if the agent does not disclose to his principal that he is the purchaser (*Dunne* v. *English*, L. R. 18 Eq. 524), especially if he attempts to conceal the fact by purchasing in the name of some one else: *Woodhouse* v. *Meredith*, 1 Jac. & W. 204; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; and see *Lewis* v. *Hillman*, 3 H. L. C. 607. Even though the sale may be perfectly fair in every respect, the mere fact that the agent did not disclose that he was himself the purchaser is sufficient to invalidate it: *McPherson* v. *Watt*, 3 App. Cas. 254.

Agent must disclose that he is the purchaser.

An agent for sale cannot purchase the property where his principal cannot himself purchase, as by reason of his being a trustee: *Hall* v. *Hallet*, 1 Cox, 134; *Lord Hardwicke* v. *Vernon*, 4 Ves. 411; *Whitcomb* v. *Minchin*, 5 Mad. 91; *Re Bloye's Trusts*, 1 Mac. & G. 488; sub nom. *Lewis* v. *Hillman*, 3 H. L. C. 607.

Agent of trustee.

A trustee for sale cannot act as agent for the purchaser: *Ex parte Bennett*, 10 Ves. 381; but see *Hickley* v. *Hickley*, 2 Ch. D. 190.

Trustee for sale agent for purchaser.

A solicitor or general agent employed to manage property is in the same position as an agent employed for a particular sale. There is no rule that a solicitor cannot purchase from his client: *Cane* v. *Lord Allen*, 2 Dow. 289; and see *Gibson* v. *Jeyes*, 6 Ves. 266; *Lewis* v. *Hillman*, 3 H. L. C. 607; *Widgery* v. *Tepper*, 7 Ch. D. 423.

Solicitor may purchase from client.

Chap. V. s. 2.

But sale liable to be set aside.

In general a solicitor, purchasing from his client, will not be allowed to make any gain to himself at the expense of the latter: *Tyrrell* v. *Bank of London*, 10 H. L. C. 26. See also the following cases where the sale was set aside: *Ward* v. *Hartpole*, 3 Bli. 470; *Jones* v. *Thomas*, 2 Y. & C. Ex. 498; *Uppington* v. *Bullen*, 2 Dru. & War. 184; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; *Robinson* v. *Briggs*, 1 Sm. & G. 188; *Savery* v. *King*, 5 H. L. C. 627; *Stump* v. *Gaby*, 2 De G. M. & G. 623; *Waters* v. *Thorn*, 22 Beav. 547; *Gresley* v. *Mousley*, 4 De G. & J. 78. In the following cases the sale was not set aside: *Montesquieu* v. *Sandys*, 18 Ves. 302; *Champion* v. *Rigby*, 1 Russ. & M. 539; *Salmon* v. *Cutts*, 4 De G. & S. 125; affirmed, 16 Jur. 623.

Solicitor for vendor selling to another client.

If a solicitor sells to another client he must satisfy the Court that he has done as much for the vendor as he would have done if the purchaser had not also been a client: *Hesse* v. *Briant*, 6 De G. M. & G. 623.

Relationship must be still subsisting.

If in the particular transaction the relationship of solicitor and client does not exist, the rule has no application: *Edwards* v. *Meyrick*, 2 Hare, 60. But it seems that it would be difficult to prove this if the solicitor had habitually acted for the client, and as such had had opportunities for finding out the value of the property. See *Austin* v. *Chambers*, 6 Cl. & Fin. 1; *Bellamy* v. *Sabine*, 2 Ph. 425; *Holman* v. *Loynes*, 4 De G. M. & G. 270.

Nor does the rule apply where the solicitor is a creditor for costs, and insists upon security, as by mortgage of the client's property: *Johnson* v. *Fesemeyer*, 3 De G. & J. 13.

Independent solicitor.

But in all cases where the solicitor wishes to purchase property from his client he will do well to insist on the intervention of another professional adviser: *Pisani* v. *A.-G. for Gibraltar*, L. R. 5 P. C. 516; and see *Gibbs* v. *Daniel*, 4 Giff. 1.

Solicitor's clerk.

A solicitor's clerk is in the same position with regard to a client as the solicitor himself: *Hobday* v. *Peters*, 28 Beav. 349.

Barrister.

A barrister who has advised a client cannot take advantage of the knowledge so acquired to purchase his client's property: *Carter* v. *Palmer*, 8 Cl. & Fin. 657.

Arbitrator.

An arbitrator cannot purchase claims which are under reference to him: *Blennerhassett* v. *Day*, 2 Ball & B. 104, 116.

Rector cannot

A rector cannot purchase a portion of his glebe sold for

redemption of land tax: *Grover* v. *Hugell*, 3 Russ. 428; and see *Greenlaw* v. *King*, 3 Beav. 49.

purchase glebe.

As to a sale or lease by the owner to the steward of an estate, see *Selsey* v. *Rhoades*, 2 Sim. & St. 41; 1 Bli. N. S. 1; *Cane* v. *Lord Allen*, 2 Dow. 289.

Steward of an estate.

As to dealings with the trust property between a trustee and his relative, see *Ferraby* v. *Hobson*, 2 Ph. 255.

Relative of trustee.

A promoter of a company stands in a fiduciary position towards the company: *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218; and see Buckley, 509.

Syndicate selling to company.

If the Court decides against the trustee the purchase will be altogether set aside, and the property ordered to be reconveyed, as in *York Buildings Co.* v. *Mackenzie*, 8 Bro. P. C. 42; *Ex parte Bennett*, 10 Ves. 381; *Boswell* v. *Coaks*, 27 Ch. D. 424; or the trustee will have to account for any profit he has made, as in *Fox* v. *Mackreth*, 2 Bro. C. C. 400; 2 Cox, 320; 1 Wh. & Tud. L. C.; *Whichcote* v. *Lawrence*, 3 Ves. 740; *Baker* v. *Carter*, 1 Y. & C. Ex. 250; with interest at five per cent., if he has been guilty of fraud: *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26; or another sale will be directed, and if no one bids more than the trustee has given, he will be held to his bargain, as in *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, 6 Ves. 625; *Lister* v. *Lister*, 6 Ves. 631; *Ex parte Badcock*, Mont. & Mac. 231.

Remedies of *cestui que trust*.

The trustee will be entitled to receive back his purchase-money, with interest at four per cent., and sums properly expended for repairs: *York Buildings Co.* v. *Mackenzie*, 8 Bro. P. C. 42, 70; *Campbell* v. *Walker*, 5 Ves. 678, 683; *Ex parte James*, 8 Ves. 337, 352; *Robinson* v. *Ridley*, 6 Mad. 2; *Watson* v. *Toone*, 6 Mad. 153; *Smedley* v. *Varley*, 23 Beav. 358. He will also be allowed for money spent on improvements (see the above cases), unless he has been guilty of gross fraud: *Baugh* v. *Price*, 1 Wils. Ex. 320; *Kenney* v. *Browne*, 3 Ridg. P. C. 462, 518; and see *Oliver* v. *Court*, 8 Pri. 127; *Boswell* v. *Coaks*, 27 Ch. D. 424, 458.

Trustee entitled to be repaid.

If a person has a title in equity to be relieved against a sale, he has, after the sale, a devisable interest in the property sold; consequently his devisees (*Gresley* v. *Mousley*, 4 De. G. & J. 78;

Heir-at-law or devisee of *cestui que trust* may bring action.

1 Giff. 450; 3 De G. F. & J. 433), or his heir-at-law (*Stump* v. *Gaby*, 2 De G. M. & G. 623), may bring an action to have the sale set aside.

Acquiescence by *cestui que trust.*

If for a considerable time the *cestui que trust* has acquiesced in the transaction, he cannot have it set aside unless he shows special circumstances (*Price* v. *Byrn*, cited 5 Ves. 681; *Baker* v. *Read*, 18 Beav. 398; *Wentworth* v. *Lloyd*, 32 Beav. 467; affirmed, 10 Jur. N. S. 960; *Barwell* v. *Barwell*, 34 Beav. 371; *Edwards* v. *Meyrick*, 2 Hare, 60); such as concealment by the trustee (*Watson* v. *Toone*, 6 Mad. 153; *Randall* v. *Errington*, 10 Ves. 423; *Chalmer* v. *Bradley*, 1 Jac. & W. 51), or fraud: *Roche* v. *O'Brien*, 1 Ball & B. 330; *Boswell* v. *Coaks*, 27 Ch. D. 424.

What is a reasonable time depends chiefly upon the opportunity the *cestui que trust* had for finding out the real nature of the transaction. See *Gregory* v. *Gregory*, Coop. 201; affirmed, Jac. 631; *Champion* v. *Rigby*, 1 Russ. & M. 539; *Roberts* v. *Tunstall*, 4 Hare, 257; *Gresley* v. *Mousley*, 4 De G. & J. 78. Time will not run while the *cestui que trust* is an infant: *Campbell* v. *Walker*, 5 Ves. 678; *Watson* v. *Toone*, 6 Mad. 153.

Acquiescence by creditors.

It is harder to prove acquiescence on the part of a large body of creditors, than on the part of an individual. See *Whichcote* v. *Lawrence*, 3 Ves. 740, 752; and see *Dover* v. *Buck*, 5 Giff. 57.

Confirmation by *cestui que trust.*

The sale to the trustee, though invalid in the first instance, may be subsequently confirmed by the *cestui que trust*: *Morse* v. *Royal*, 12 Ves. 355. "But when the original fraud is clearly established by circumstances not liable to doubt, a confirmation of such a transaction is so inconsistent with justice, so unnatural, so likely to be connected with fraud, that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence, as an act done with all the deliberation that ought to attend a transaction, the effect of which is to ratify that which in justice ought never to have taken place:" per Lord Erskine, *Ibid.* p. 373; and see *De Bussche* v. *Alt*, 8 Ch. D. 286.

The confirmation may be by a subsequent deed quite independent of the original transaction (*Wood* v. *Downes*, 18 Ves.

120); or it may be by will: *Stump* v. *Gaby*, 2 De G. M. & G. 623; but see *Waters* v. *Thorn*, 22 Beav. 547.

But the *cestui que trust* must at the time of confirmation be in possession of all the facts, and must also be aware that the purchase was invalid: *Roche* v. *O'Brien*, 1 Ball & B. 330; *Dunbar* v. *Tredennick*, 2 Ball & B. 304; *Salmon* v. *Cutts*, 4 De G. & Sm. 125; affirmed, 16 Jur. 623; *Savery* v. *King*, 5 H. L. C. 627.

A confirmation approved by independent solicitors will probably be upheld: *De Montmorency* v. *Devereux*, 7 Cl. & Fin. 188; but see *Gibbs* v. *Daniel*, 4 Giff. 1.

Sect. 3.—*Sale by Tenant for Life.*

Tenant for life a trustee.

By the 53rd section of the Settled Land Act, 1882, it is declared that a tenant for life shall, in exercising any power under the Act, have regard to the interests of all parties entitled under the settlement, and shall in relation to the exercise thereof by him be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

A tenant for life therefore cannot sell to himself (see p. 134); although he is not precluded from buying from the trustees of his settlement, who have a power of sale with his consent or at his request: *Howard* v. *Ducane*, T. & R. 81; *Dicconson* v. *Talbot*, L. R. 6 Ch. 32.

Whether he can now grant a lease to himself may be doubted. See *Wilson* v. *Sewell*, 4 Burr. 1979; *Bevan* v. *Habgood*, 1 J. & H. 222.

Who is a tenant for life.

The tenant for life is defined to be the person who is for the time being under a settlement beneficially entitled to possession of the settled land for his life: sect. 2, sub-s. 5.

By sect. 58 the powers of a tenant for life are conferred upon the following persons when their estates or interests are in possession:—

1. A tenant in tail.

2. A tenant in fee simple with an executory gift over. See *Re Morgan*, 24 Ch. D. 114; *Re James's Settled Estates*, 32 W. R. 898.

Chap. V. s. 3.

3. A person entitled to a base fee.

4. A tenant for years determinable on life, not holding merely under a lease at a rent. See *Re Hazle's Settled Estates*, 26 Ch. D. 428.

5. A tenant for the life of another, not holding merely under a lease at a rent.

6. A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, or is subject to a trust for accumulation of income. See *Re Hazle's Settled Estates*, 26 Ch. D. 428.

7. A tenant in tail after possibility of issue extinct.

8. A tenant by the curtesy. See Settled Land Act, 1884, s. 8.

9. A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event. Under this sub-section a person is included, although the surplus income payable to him is little or nothing: *Re Jones*, 24 Ch. D. 583; *Re Clitheroe's Estate*, 28 Ch. D. 378.

Infant.

If an infant is entitled in possession to land he is to be deemed a tenant for life thereof (sect. 59); and the trustees may exercise his powers on his behalf: sect. 60. See *Re Wells*, 31 W. R. 764; *Re Duke of Newcastle's Estates*, 24 Ch. D. 129. In appointing trustees for this purpose the Court can authorize them to sell out of Court: *Re Price*, 27 Ch. D. 552.

Married woman.

A married woman tenant for life can exercise the powers given by the Act, without or with the concurrence of her husband, according as she is or is not entitled for her separate property. See sect. 61.

Lunatic.

Where the tenant for life is a lunatic, the committee of his estate may under an order of the Lord Chancellor exercise the powers of a tenant for life: sect. 62. See *Re Taylor*, 31 W. R. 596; *Re Ray's Settled Estates*, 25 Ch. D. 464.

Power to sell and lease.

Power to sell the settled land is given to the tenant for life by sects. 3, 4; power to lease by sects. 6 *et seq.*

Where tenant for life has assigned his interest.

The power of sale is exerciseable by the tenant for life after any assignment of his interest: sect. 50, sub-sect. 1. But the

assignee's rights are not to be affected without his consent: sub-sect. 3. Chap. V. s. 3.

This provision is in accordance with the law as laid down in the following cases: *Berry* v. *White*, Bridg. 82, 91; *Ren* v. *Bulkeley*, 1 Doug. 292; *Goodright* v. *Cator*, *Ibid.* 478; *West* v. *Berney*, 1 Russ. & M. 431; *Simpson* v. *Bathurst*, L. R. 5 Ch. 193; and see *ante*, p. 126.

The trustees of the settlement for the purposes of the Act are by sect. 2, sub-sect. 8, defined to be the persons, if any, who are for the time being under a settlement trustees with power of sale of settled land, or with power of consent to, or approval of, the exercise of such a power of sale; or if under a settlement there are no such trustees, then the persons, if any, for the time being who are by the settlement declared to be trustees thereof for purposes of this Act. Who are trustees.

If there are no such trustees they must be appointed under sect. 38. See *Re Garnett Orme's Contract*, 25 Ch. D. 595.

A tenant for life who is selling the settled land under the Settled Land Act, 1882 (see sect. 3), must comply with the provisions of the following sections. Sale by tenant for life.

Sect. 45. He must give one month's notice to the trustees, and their solicitor, if known, of his intention to exercise his powers. By sect. 5, sub-sect. 1, of the Settled Land Act, 1884, such notice may be of a general intention in that behalf. This alters the law as laid down in *Re Ray's Settled Estates*, 25 Ch. D. 464. The number of trustees must not be less than two at the date of notice: sub-sect. 2. If there are no trustees existing, new trustees must be appointed: *Wheelwright* v. *Walker*, 23 Ch. D. 752. Notice to trustees.

The notice is properly served by posting registered letters to the usual or last-known place of abode of each of the trustees (sub-sect. 1), whether the letters are ever received or not: see *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216; *Carta Para Gold Mining Co.* v. *Fastnedge*, 30 W. R. 880. Service of notice.

Sect. 4. The sale may be by auction or by private contract, and in one or several lots, with reserve biddings, and subject to any stipulations as to title. Sub-sects. 3, 4, 5. Manner of sale.

Chap. V. s. 3.

Price. It must be for the best price that can reasonably be obtained. The Court will not at the suit of the remainderman restrain a sale on merely speculative evidence as to an expected increase in value from the development of mines and the construction of a railway through the estate: *Thomas* v. *Williams*, 24 Ch. D. 558.

Mansion-house. Sect. 15. The principal mansion-house and the demesnes thereof cannot be sold without the consent of the trustees or an order of the Court. As to what is a principal mansion-house, see *Re Spurway's Settled Estates*, 10 Ch. D. 230.

The mere fact that the settlor has expressly forbidden the mansion-house to be sold is no ground for not sanctioning a sale by the tenant for life: *Re Brown's Will*, 27 Ch. D. 179.

If there is more than one estate in the family the Court will more readily sanction a sale: *Marquis Camden* v. *Murray*, 27 Sol. Jour. 652.

Heirlooms. The tenant for life is empowered under sect. 37 to sell the heirlooms. But he must first obtain an order of the Court: sub-sect. 3; and see *Re Brown's Will*, 27 Ch. D. 179.

Minerals. Sect. 17. The tenant for life can sell the surface apart from the minerals, or the minerals apart from the surface. This power can also be exercised by the trustees on behalf of an infant tenant for life: *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.

Contract. Sect. 31. The tenant for life can enter into the contract for sale. Such contract will bind the remainderman (sub-sect. 2; and see *Shannon* v. *Bradstreet*, 1 Sch. & L. 52), unless the terms are not authorized (see *Ricketts* v. *Bell*, 1 De G. & S. 335), or are not in accordance with the Statute of Frauds: see *Blore* v. *Sutton*, 3 Mer. 237. But the remainderman will not be permitted to repudiate the contract after acquiescence: *Stiles* v. *Cowper*, 3 Atk. 692; and see *Ramsden* v. *Dyson*, L. R. 1 H. L. 129.

The contract may be varied or rescinded: sub-sects. 2, 3.

Conveyance. Sect. 20 gives the tenant for life power to convey. Such conveyance will take effect subject to all interests prior to the settlement, and to other interests mentioned in sub-sect. 2.

Sect. 5 empowers the tenant for life to transfer any incumbrance on the land sold to any other part of the settled land, with the consent of the incumbrancer.

Payment of purchase-money.

Sect. 22. The purchase-money must be paid either to the trustees of the settlement, or into Court, at the option of the tenant for life.

Money paid into Court under the Lands Clauses Act may be paid out to the trustees: *Re Duke of Rutland's Settlement*, 31 W. R. 947; *Re Wright's Trusts*, 24 Ch. D. 662; *Re Harrop's Trusts*, *ibid.* 717; and see sect. 32.

Sect. 39. There must be at least two trustees to receive the money, unless the settlement authorizes payment to one.

Sect. 40. The trustee's receipt is an effectual discharge.

Protection of purchaser.

Sect. 54 gives a general protection to purchasers dealing in good faith with the tenant for life.

Sect. 4.—*Sale by Executors for Payment of Debts.*

Direction in will that debts be paid.

It is now settled that if a testator wills or devises (*Trott* v. *Vernon*, 2 Vern. 708), or directs (*Williams* v. *Chitty*, 3 Ves. 545), or desires (*Harding* v. *Grady*, 1 Dru. & War. 430) his debts to be paid, or gives his property after his debts are satisfied (*Harris* v. *Ingledew*, 3 P. Wms. 91), he thereby charges his debts on the real estate, and the executors take an implied power of sale. See cases collected in Jarm. Wills, 4th ed. ii. 585 *et seq.* In all the decided cases, however, the real estate was mentioned specifically or generally in the will. It is doubtful, therefore, whether a direction to pay debts would charge real estate of which no mention was made. See Jarm. 591.

Direction that debts be paid by executor.

No charge, however, will be implied where the direction is that the executors shall pay the debts, because this they are bound to do out of the personal property. See *Keeling* v. *Brown*, 5 Ves. 359.

But where there is a direction that the executors shall pay the debts, accompanied by a gift of the testator's real estate to them, either beneficially or on trust, the debts will, if the personal estate is insufficient, be payable out of all the estate so

Chap. V. s. 4.

given to them. In such cases the entirety of the liability must be thrown on the entirety of the estate (*In re Bailey*, 12 Ch. D. 268), unless the testator has specially directed the debts to be paid out of a particular property: *Thomas* v. *Britnell*, 2 Ves. sen. 313. This, of course, does not alter the incidence of the charge as between the several classes of property.

Executors may sell within twenty years.

When the executors have power to sell for payment of debts, they may exercise that power at any time within twenty years from the decease of the testator, and they need not answer an inquiry by the purchaser whether the debts have been paid: *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.

A charge by the testator on his real estate, "in case his personal estate should be insufficient for the payment of his debts," does not render it necessary for the executor to show the insufficiency of the personal estate: *Greetham* v. *Colton*, 34 Beav. 615.

Proper parties to convey.

The question sometimes arises, where the executors have an implied power of sale, and can give a receipt for the purchase-money (see *Greetham* v. *Colton*, 34 Beav. 615), who are the proper persons to join in the conveyance for the purpose of passing the legal estate.

Before Lord St. Leonards' Act.

In the case of wills coming into operation before Lord St. Leonards' Act (13th August, 1859), it seems that where there was a direction that the debts should be paid, the executors were the proper persons to sell and convey, because this gave them a power of sale at common law: *Forbes* v. *Peacock*, 11 M. & W. 630. Where, however, there was only a charge of debts on real estate which was not devised to the executors, it seems that the concurrence of the devisee or heir-at-law was necessary: *Doe* v. *Hughes*, 6 Exch. 223; and see *Gosling* v. *Carter*, 1 Coll. 644; *Robinson* v. *Lowater*, 17 Beav. 592; 5 De G. M. & G. 272, in which case the concurrence of the heir-at-law was obtained; see also Sug. Pow. p. 115 *et seq.* Such cases, however, are not likely to arise now, because it is not probable that executors under a will more than twenty years old will be selling real estate for payment of debts. See *In re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.

Wills whereby debts are charged on the real estate, coming

into operation after the 13th August, 1859, are regulated by Lord St. Leonards' Act (22 & 23 Vict. c. 35), which provides that where the testator has devised the estate so charged to any trustees for the whole of his interest, and shall not have made any express provision for raising the debts out of the estate, the trustees may raise such debts by a sale or mortgage of the estate. See sects. 14, 15. And where the testator has not devised his whole interest in the estate to any trustees his executors, if any, shall have the like power of raising the said moneys. See sect. 16.

Under Lord St. Leonards' Act.

This enactment does not extend to the case of an administrator with the will annexed: *In re Clay and Tetley*, 16 Ch. D. 3. See also sects. 17 and 18.

A charge of debts on the real estate authorizes a mortgage as well as a sale (see Lord St. Leonards' Act, s. 14; *Corser* v. *Cartwright*, L. R. 7 H. L. 731), and apparently any dealing with the real estate by which the testator's debts are satisfied or compromised: *West of England Bank* v. *Murch*, 23 Ch. D. 138.

Charge of debts authorizes mortgage.

The purchaser is not affected if the executor misapply the purchase-money: *Corser* v. *Cartwright*, L. R. 7 H. L. 731.

Sect. 5.—*Sale by Mortgagee.*

Although a mortgagee, in exercising his power of sale, is not a trustee for the mortgagor, even though the mortgage is in the form of a trust for sale (*Warner* v. *Jacob*, 20 Ch. D. 220; explaining *Robertson* v. *Norris*, 1 Giff. 421; and see *Anon.*, 6 Mad. 10), yet, for a particular purpose, the character of trustee constructively belongs to a mortgagee: *Cholmondeley* v. *Clinton*, 2 Jac. & W. 1, 182; *Dobson* v. *Land*, 8 Hare, 216, 220. He is a trustee for the mortgagor of the surplus money: *Locking* v. *Parker*, L. R. 8 Ch. 30; *Re Alison*, 11 Ch. D. 284; *Banner* v. *Berridge*, 18 Ch. D. 254; and see Conveyancing Act, 1881, s. 21, sub-s. 3. See also *post*, p. 151.

Mortgagee to what extent a trustee.

In the case of *West London Commercial Bank* v. *Reliance Building Society* (27 Ch. D. 187), it was held that where property,

on consequence
liable for mistake in fact / Mortgagee
Imelin v Luce 43 AD 191

Chap. V. s. 5.

subject to two mortgages, was sold by the mortgagor, and the first mortgagees joined for the purpose of being paid off and conveying the legal estate to the purchaser, they were liable to the second mortgagees, of whose charge they had notice, because they allowed the mortgagor to receive the surplus.

Fraudulent sale.

A sale by a mortgagee at a fraudulent undervalue, or by collusion with the purchaser, will be set aside: *Jones* v. *Matthie*, 11 Jur. 504; varying 2 Coll. 465.

Disadvantageous sale.

The mere fact, however, of the sale being very disadvantageous is no ground for interference, unless the price is so low as to be in itself evidence of fraud: *Warner* v. *Jacob*, 20 Ch. D. 220.

A mortgagee though in possession may not give a portion of the land to the trustees of a charity, neither may he sell it to them at a valuation and then make them a present of the price: *Davey* v. *Durrant*, 1 De G. & J. 535.

Part of purchase-money may remain on mortgage.

He may allow part of the purchase-money to remain on mortgage: *Ibid.*; *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97.

Depreciatory conditions.

He should not sell under conditions of sale which are unduly depreciatory: *Hobson* v. *Bell*, 2 Beav. 17; *Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352; and see p. 128.

If he sells the mortgaged property, together with other property, the purchase-money must be properly apportioned: *Re Cooper and Allen's Contract*, 4 Ch. D. 802.

Sale by first and second mortgagees together.

There is no objection to the first and the second mortgagees joining in selling the mortgaged property: *McCarogher* v. *Whieldon*, 34 Beav. 107.

Sale under Conveyancing Act, 1881.

The Conveyancing Act, 1881, repeals ss. 11—24 of Lord Cranworth's Act (see sect. 71), and provides that a mortgagee, when the mortgage is made by deed, shall have a power, when the mortgage money has become due, to sell the mortgaged property (sect. 19, sub-s. 1). This section applies to mortgages made after the commencement of the Act, unless a contrary intention is expressed in the deed (sub-ss. 3, 4). The power of sale thereby given is as extensive as that which used to be contained in the mortgage deed, and the authorities which exist with respect to the latter are, for the most part, equally applicable to the case of a mortgagee selling under the Conveyancing Act.

Such power of sale is only to be exercised in one of the following cases:—1. Where notice requiring payment of the mortgage money has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service. 2. Where some interest under the mortgage is in arrear and unpaid for two months after becoming due. 3. Where there has been a breach of some provision contained in the mortgage deed or in the act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed other than and besides a covenant for payment of the mortgage money or interest thereon. Power of sale, when exerciseable.

With regard to the notice requiring payment, six months was the time given by Lord Cranworth's Act, and usually inserted in mortgage deeds, corresponding to the six months' notice to the mortgagee before paying him off; as to which see *Letts* v. *Hutchins*, L. R. 13 Eq. 176; *Re Alcock*, 23 Ch. D. 372. Length of notice.

Where a solicitor had advanced money to a client upon a second mortgage, in which a power of sale was inserted, exerciseable without notice, it was held that he ought to have explained to him that such was not the usual form: *Cockburn* v. *Edwards*, 18 Ch. D. 449.

Under a mortgage deed providing for payment on demand, the mortgagor is entitled to a reasonable notice giving him an opportunity of complying with it: *Massey* v. *Sladen*, L. R. 4 Ex. 13.

The notice is properly given by nailing it on the mortgagor's last known place of abode: *Major* v. *Ward*, 5 Hare, 598. Service of notice.

If the deed provides for notice to be given to the mortgagor or his heirs, and the mortgagor dies, notice must be given to his heir, and, if he is an infant, to his guardian (*Tracey* v. *Lawrence*, 2 Drew. 403); and, if notice has to be given to executors or administrators, the sale cannot take place until they are constituted: *Parkinson* v. *Hanbury*, 1 Dr. & S. 143; L. R. 2 H. L. 1. Notice to heir.

If the notice is required to be given to the assigns of the mortgagor, the mortgagee selling without giving notice to an assign, such as a second mortgagee, will be liable to him in damages, even though the mortgagor himself consents to the Notice to assigns.

Chap. V. s. 5.

sale: *Forster* v. *Hoggart*, 15 Q. B. 155; *Hoole* v. *Smith*, 17 Ch. D. 434. In well drawn mortgages notice was not required to be given to assigns; now, however, it becomes a question whether under the above section of the Conveyancing Act, 1881, the notice which is to be given to the mortgagor must not also be given to his assign, as being a person deriving title under him or entitled to redeem (see definition of mortgagor in sect. 2, sub-sect. vi.), unless the difficulty is met by the words "one of several mortgagors" in sect. 20.

Conveyance and receipt.

Under sect. 21, sub-s. 1, the mortgagee can convey the property sold, and under sect. 22 he can give a receipt for the purchase-money. The purchaser cannot require the concurrence of the mortgagor, even though the mortgage deed contains a covenant on his part to join in the sale: *Corder* v. *Morgan*, 18 Ves. 344; and see *King* v. *Heenan*, 3 De G. M. & G. 890.

Protection of purchaser.

Sect. 21, sub-s. 2, protects the purchaser in case the power of sale has been improperly exercised, see *Dicker* v. *Angerstein*, 3 Ch. D. 600. This, however, would not apply if the purchaser had notice of the impropriety of the sale: *Jenkins* v. *Jones*, 2 Giff. 99; *Parkinson* v. *Hanbury*, 1 Dr. & S. 143; L. R. 2 H. L. 1. Such notice must be actual, and not constructive merely: *Borell* v. *Dann*, 2 Hare, 440.

Surplus money.

If the estate is sold by the mortgagee in the lifetime of the mortgagor, the surplus money is personal estate of the mortgagor, and on his death, before receiving it, his legal personal representatives are entitled to receive it. But if the estate is sold after the death of the mortgagor, his devisee or heir-at-law is entitled to the surplus: *Wright* v. *Rose*, 2 Sim. & St. 323; *Bourne* v. *Bourne*, 2 Hare, 35. And it makes no difference, although the deed directs the surplus to be paid to the mortgagor, his heirs, executors, administrators or assigns, or to the mortgagor, his executors or administrators, instead of to the mortgagor, his heirs or assigns, which is the usual and proper form: *Ibid.* See, however, *Re Underwood* (3 K. & J. 745), where the mortgage was in the form of a trust for sale, and *Re Alison*, 11 Ch. D. 284.

The cases of *Wright* v. *Rose* and *Bourne* v. *Bourne* (*ubi sup.*) have been held to have no application where a man had, on his

marriage, settled the land to such uses as he and his wife should appoint, and subject to such appointment to the use of the husband and wife for life, with remainder to the use of their children, and afterwards, in exercise of such power of appointment, the husband and wife appointed to the mortgagee, with a provision that the surplus after sale was to be paid to the husband, his heirs, executors, administrators or assigns. The sale was made after the death of the husband, and Fry, J., held that the surplus belonged to his legal personal representative: *Jones* v. *Davies*, 8 Ch. D. 205.

When mortgagee entitled to retain surplus.

The mortgagee is not an express trustee within the Statutes of Limitations, and, therefore, if he has been in possession for more than twelve years and then sells, he need not account to the mortgagor for any surplus, even though the mortgage is in the form of a trust for sale: *Re Alison*, 11 Ch. D. 284; and see p. 203.

Payment into Court.

If there is sufficient ground for doubt as to the persons entitled to the surplus, the mortgagee may pay the money into Court, under the Trustee Relief Act: *Roberts* v. *Ball*, 24 L. J. Ch. 471; and see *Re Walhampton Estate*, 26 Ch. D. 391.

A mortgagee may enforce all his remedies at the same time: *Cockell* v. *Bacon*, 16 Beav. 158; and see *Lockhart* v. *Hardy*, 9 Beav. 349; *Farrer* v. *Lacy & Co.*, 25 Ch. D. 636. The power of sale does not affect the right of foreclosure: *Slade* v. *Rigg*, 3 Hare, 35; *Wayne* v. *Hanham*, 9 Hare, 62; and see Conveyancing Act, 1881, s. 21, sub-s. 5.

Tender of amount due.

The mortgagor or person entitled to redeem can stop the mortgagee from exercising his power of sale by tender of the amount due upon the mortgage for principal, interest and costs: *Rhodes* v. *Buckland*, 16 Beav. 212; *Jenkins* v. *Jones*, 2 Giff. 99.

Sale pending action for redemption.

A sale, pending an action for redemption, is, in the absence of collusion between the mortgagor and the purchaser, perfectly good (*Adams* v. *Scott*, 7 W. R. 213); and the Court will not, as an ordinary rule, grant an interlocutory injunction restraining the mortgagee from selling, except on terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due for principal, interest and costs. The rule ought not to be applied to a case where there is a solicitor who is a mort-

Chap. V. s. 5.

gagee seeking to enforce securities against a client: per Cotton, L. J., *Macleod* v. *Jones*, 24 Ch. D. 289, 301.

Sale by transferree of mortgage.

The question is sometimes raised whether the power of sale in the original mortgage can be exercised by an assign of the mortgagee. No doubt arises where assigns are mentioned in the deed, and even if they are not it seems that the Court will hold the power of sale to have passed by the transfer. See *Boyd* v. *Petrie* (L. R. 7 Ch. 385), in which Mellish, L. J., says, p. 394: "It appears to me very irrational to suppose that any new mortgagees advancing money for the purpose of paying off an old mortgage and taking an assignment of that old mortgage should not have every right which the old mortgagees had." See also *Ashworth* v. *Mounsey*, 9 Exch. 175; *Young* v. *Roberts*, 15 Beav. 558; Dav. Conv. Vol. ii. pt. 2, 270, 4th ed.

The transferee of a mortgage can exercise the power of sale given by the Conveyancing Act, 1881. See sect. 2 (vi.)

Sale by legal personal representative of mortgagee.

If the mortgagee is dead his estate will, if the death took place after the commencement of the Conveyancing Act, 1881, devolve upon his legal personal representatives, who are also to be deemed his heirs and assigns within the meaning of all trusts and powers, notwithstanding any testamentary disposition (see sect. 30); they will therefore be the proper persons to sell and convey. If the mortgagee died before the commencement of the Act his executor or administrator will be the proper person to sell (*Saloway* v. *Strawbridge*, 7 De G. M. & G. 594); but as to the person in whom the legal estate is, in such case, vested, see *post*, Chap. XXI., p. 284.

A power of sale given to two mortgagees in a mortgage to secure money advanced on a joint account can be exercised by the survivor: *Hind* v. *Poole*, 1 K. & J. 383; and see Conveyancing Act, 1881, s. 61.

Mortgagee cannot sell to himself.

It is quite clear that a mortgagee exercising his power of sale cannot purchase the property on his own account (*Downes* v. *Grazebrook*, 3 Mer. 200, where the mortgage was in the form of a trust for sale; *Martinson* v. *Clowes*, 21 Ch. D. 857); neither can the secretary of a building society, selling as mortgagees (*Ibid.*); nor any agent of the mortgagee, see *ante*, p. 137. And this rule especially applies if the purchase has been collu-

sively made through a third person: *Robertson* v. *Norris*, 1 Giff. 421, a case which seems to have been rightly decided, though some of the dicta of the V.-C. Stuart have been disapproved. See *Nash* v. *Eads*, 25 Sol. Jour. 95; *Warner* v. *Jacob*, 20 Ch. D. 220; *Martinson* v. *Clowes*, 21 Ch. D. 857.

Leave to mortgagee to bid.

On a sale by the order of the Court the mortgagee can obtain leave to bid: *Ex parte Marsh*, 1 Mad. 148; *Ex parte Du Cane*, Buck. 18; *Ex parte McGregor*, 4 De G. & S. 603. Even if the mortgagee has bid without first obtaining leave, it does not follow that the purchase by him will be necessarily set aside where the sale has been conducted by the trustee in bankruptcy. See *Ex parte Ashley*, 1 Mont. & A. 82; *Ex parte Pedder*, *ibid.* 327; *Ex parte Yorke*, 3 Mont. D. & D. 329.

Mortgagee may purchase from mortgagor.

A mortgagee may purchase the property from his mortgagor, and the consideration may be the amount of the mortgage debt: *Knight* v. *Marjoribanks*, 2 Mac. & G. 10. The mortgagor and mortgagee under such circumstances are to be regarded as on the ordinary footing of vendor and purchaser, and the burden of impeaching the deed rests on the mortgagor: *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307, 315. See, however, *Prees* v. *Coke*, L. R. 6 Ch. 645.

Transaction looked upon with jealousy.

The transaction will nevertheless be looked upon with jealousy, and will be set aside if the mortgagee uses pressure to obtain the property at less than its value from a mortgagor in embarrassed circumstances (*Ford* v. *Olden*, L. R. 3 Eq. 461); or if there is anything amounting to fraud or collusion in the arrangements for purchase: *National Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 App. Cas. 391.

Lease from mortgagor to mortgagee.

A lease from a mortgagor to a mortgagee, though for a long term of years, and at a fair value, is viewed with considerable disfavour. See *Webb* v. *Rorke*, 2 Sch. & L. 661; *Hickes* v. *Cooke*, 4 Dow. 16.

Second mortgagee may purchase from first.

There is no rule that a second mortgagee may not purchase from the first mortgagee selling under his power of sale: *Parkinson* v. *Hanbury*, 1 Dr. & S. 143; L. R. 2 H. L. 1. He thereby acquires the same absolute irredeemable title as a stranger purchasing would have: *Shaw* v. *Bunny*, 2 De G. J. & S. 468. And the circumstance that the second mortgage is in the form

Chap. V. s. 5.

of a trust for sale does not alter the case: *Kirkwood* v. *Thompson*, 2 H. & M. 392; 2 De G. J. & S. 613.

A first mortgagee buying up the interest of the second mortgagee at a reduced price with a view to a subsequent advantageous sale, for which he has entered into arrangements, need not inform the second mortgagee of such arrangements: *Dolman* v. *Nokes*, 22 Beav. 402.

A mortgagor who purchases the estate from the first mortgagee, at a price insufficient to pay off the mortgage, cannot thereby defeat the title of the second mortgagee: *Otter* v. *Lord Vaux*, 6 De G. M. & G. 638.

A trustee who had improperly obtained a mortgage on the trust estate was held unable to make a good title under his power of sale: *Eland* v. *Baker*, 29 Beav. 137.

Sect. 6.—*Sale by Trustee in Bankruptcy.*

Bankruptcy Act, 1883.

Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 54, sub-s. 2, on the appointment of a trustee the property of the bankrupt forthwith passes to and vests in the trustee appointed. By sect. 56, sub-s. 1, the trustee may sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book-debts due or growing due to the bankrupt) by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels. By sub-s. 2, the trustee may give receipts for the purchase-money.

On the sale of property of the bankrupt it is usual to make him a party to the conveyance as well as the trustee. See Dav. Conv. Vol. II. 618. By sect. 24, sub-s. 2, of the Bankruptcy Act, 1883, it is enacted that the debtor shall execute such powers of attorney, conveyances, deeds, and instruments as may be reasonably required by the trustee.

Under sect. 50, sub-s. 4, the trustee can, without himself being admitted, appoint copyholds of the bankrupt to the use of the purchaser, who will thereupon be entitled to be admitted.

Sect. 7.—*Sale by Trustees of a Charity.*

Consent of Charity Commissioners.

By the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29, it is enacted that it shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament under any Act already passed, or which may hereafter be passed, or of a Court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board of Commissioners, any sale, mortgage or charge of the charity estate or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine or for any term of years exceeding twenty-one years.

See also the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137); 23 & 24 Vict. c. 136; 32 & 33 Vict. c. 110; 46 & 47 Vict. c. 18.

Land purchased not out of endowments.

Land, which has been purchased out of voluntary contributions, and not out of any of the funds forming the endowment of the charity, may be sold by the trustees without the consent of the Charity Commissioners: *Governors for Relief of Widows of Clergymen* v. *Sutton*, 27 Beav. 651; *Re Royal Society of London and Thompson*, 17 Ch. D. 407. And see *Finnis to Forbes*, 24 Ch. D. 587.

As to the power of charity trustees to sell allotments, see Allotments Extension Act, 1882. And see *Parish of Sutton to Church*, 26 Ch. D. 173.

Before the Charitable Trusts Act it was lawful for the trustees of a charity in a proper case to sell or grant a long lease of the charity property: *Att.-Gen.* v. *South Sea Co.*, 4 Beav. 453. And see *Re Parke's Charity*, 12 Sim. 329; *Att.-Gen.* v. *Mayor of Newark*, 1 Hare, 395; *Re Overseers of Ecclesall*, 16 Beav. 297.

Such a transaction was, however, liable to be set aside (*Lydiatt* v. *Foach*, 2 Vern. 410; *Att.-Gen.* v. *Green*, 6 Ves. 452; *Att.-Gen.* v. *Brooke*, 18 Ves. 319; *Att.-Gen.* v. *Kerr*, 2 Beav. 420; *Att.-Gen.* v. *Pargeter*, 6 Beav. 150; *Att.-Gen.* v. *Foord*, *ibid.*, 288); unless the purchaser could show that it was fairly

Chap. V. s. 7.

made, and for the benefit of the charity: *Att.-Gen.* v. *Pilgrim*, 12 Beav. 57. And see *Att.-Gen.* v. *Hungerford*, 2 Cl. & Fin. 357; *Att.-Gen.* v. *Brettingham*, 3 Beav. 91.

Statutes of Limitations.

Charities are within the operation of the Statutes of Limitation, and therefore their right to recover will be barred after the lapse of twelve years: *Att.-Gen.* v. *Magdalen Coll.*, 6 H. L. C. 189; *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; *Mayor of Brighton* v. *Guardians of Brighton*, 5 C. P. D. 368.

Sale to railway company.

When land belonging to a charity is taken under the Lands Clauses Consolidation Act, 1845, the trustees of the charity can sell and convey the land under the express authority of that Act. See Charitable Trusts Amendment Act, 1855, s. 29. The money, however, must be paid into Court, when it may be paid out to the trustees of the charity on their application without serving the Charity Commissioners: *Re Tid St. Giles's Charity*, 17 W. R. 758; *Re Spurstowe's Charity*, L. R. 18 Eq. 279, and see *Re Lister's Hospital*, 6 De G. M. & G. 184. The contrary was held in *Re Faversham Charities* (10 W. R. 291), but this case has not been followed.

Sect. 8.—*Purchases by Trustees.*

Settled Land Act, 1882.

Under the Settled Land Act, 1882, any capital money arising under the Act, and also any money in the hands of trustees liable to be laid out in the purchase of land to be made subject to the settlement (see sect. 33), may be invested in any of the modes provided by the 21st section.

Option of tenant for life.

The investment of capital money arising under the Act is to be made according to the direction of the tenant for life, and only in default of such direction according to the discretion of the trustees: sect. 22, sub-s. 2.

Discretion of trustees.

Whether money given to trustees to invest, and therefore not actually arising under the Act, is to be invested according to the direction of the tenant for life, or whether the trustees are to have a voice in the investment, is not quite clear. The words of sect. 33 are, "they *may*, at the option of the tenant for life, invest, &c."

It seems that the tenant for life could compel the trustees to invest in any manner within sect. 21. In *Beauclerk* v. *Ashburnham* (8 Beav. 322), it was held that trustees who were authorised and required, with the consent and direction of the tenant for life, to lay out money in the purchase of freehold, copyhold or leasehold hereditaments, were bound to invest on leaseholds on the requisition of the tenant for life. So also *Cadogan* v. *Earl of Essex*, 2 Drew. 227; see, however, *Lee* v. *Young*, 2 Y. & C. C. 532.

Where the tenant for life is an infant, the investment may be made by the trustees of the settlement on his behalf: sect. 60.

What may be purchased.

The purchase may be of the seignory of any freehold land, or of the fee simple of any copyhold or customary land, or of the reversion of any leaseholds already subject to the settlement. Or it may be of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired. The land may be purchased without the mines, and mines convenient to be worked with those under the land already in settlement may be purchased without the surface. See sect. 21 (v), (vi), (vii), (viii).

Money directed to be laid out in the purchase of hereditaments in fee simple in possession may be invested in the purchase of freehold ground rents: *Re Peyton's Settlement*, L. R. 7 Eq. 463.

Title.

Trustees frequently purchase land under conditions which preclude them from requiring the full title of forty years. Whether they would be held liable for accepting such a title if it afterwards turned out to be bad does not seem to have been actually decided. The Court has sanctioned the acceptance of shorter titles. See *Re The Sheffield Ry. Co.*, 1 Sm. & G. App. 4; *Meyrick* v. *Laws*, 34 Beav. 58; *Ex parte Governors of Christ's Hospital*, 2 H. & M. 166.

Trustees accepting short title protected.

There can, however, be little doubt that now trustees, who under conditions of sale accept a title of less than forty years, would not, if the title proved to be defective, be committing a breach of trust for which they could be held personally liable. For it is provided by sect. 3, sub-s. 3, of the Conveyancing Act, 1881, that no requisition shall be made respecting the title

Chap. V. s. 8.

earlier than that stipulated for commencement; and by sect. 66 solicitors and trustees for whom they act shall not be liable if they do not on entering into a contract exclude the operation of the Act.

Trustees may also buy without excluding the operation of the second section of the Vendor and Purchaser Act, 1874: see sect. 3.

Costs.

The costs of investing in land are payable out of the trust moneys directed to be invested. See Settled Land Act, 1882, s. 21 (x); *Gwyther* v. *Allen*, 1 Hare, 505.

Purchase by charity trustees.

On the purchase of land by the trustees of a charity, the formalities required by the Mortmain Act (9 Geo. II. c. 36), must be complied with, viz., the conveyance must be by indenture attested by two witnesses, and inrolled within six months after execution. See *Bunting* v. *Sargent*, 13 Ch. D. 330. It is not necessary that the grantor should survive the execution for twelve months when the purchase is *bonâ fide* for a full and valuable consideration, see sect. 2.

CHAPTER VI.

SALES BY THE COURT.

SECT.		PAGE
1.	*Jurisdiction of the Court*	159
	i. *Partition Act*	159
	ii. *Conveyancing Act*, 1881, *s.* 25	162
	iii. *Settled Estates Act*, 1877	163
	iv. *Subsidiary regulations*	163
2.	*Conduct of the Sale*	163
	i. *How given*	163
	ii. *To whom given*	164
	iii. *Leave to bid*	164
	iv. *Certificate of result*	165
	v. *Opening biddings*	165
3.	*Payment of Purchase-Money*	166
	i. *Order for payment into Court*	166
	ii. *Payment out of Court*	166
4.	*Completion of Purchase*	167
	i. *Necessary parties*	167
	ii. *Discharge of incumbrances*	167
	iii. *Trustee Act*	168
	iv. *Conveyance, how settled*	168
	v. *Title deeds*	168
5.	*Discharge of Purchaser*	168

SECT. 1.—*Jurisdiction of the Court.*

THE Court had no inherent jurisdiction to order sales of land, but this jurisdiction has been conferred upon it by various Acts of Parliament.

Under the Partition Act, 1868 (31 & 32 Vict. c. 40), sect. 3, in an action for partition, if it appears that by reason of the nature of the property, or of the number of the parties interested, or of the absence or disability of some of them, or of any other circumstance, a sale of the property and a distribution of the proceeds will be more beneficial for the parties interested than a division of the property, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property. Partition Act, 1868, s. 3.

Under sect. 4, if the party or parties interested individually or collectively to the extent of one moiety or upwards in the property request a sale, the Court shall, unless it sees good reason to the contrary, direct a sale of the property. Sect. 4.

Chap. VI. s. 1.

Sect. 5.

Under sect. 5, if any party interested requests a sale, the Court may, if it thinks fit, unless the other parties interested in the property of some of them undertake to purchase the share of the party requesting a sale, direct a sale of the property.

The effect of these three sections was very carefully considered by Jessel, M. R., in the case of *Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 528. He there says, p. 531: "Under the fourth section, where the parties requesting a sale have got more than a moiety, you do not want the fifth section; it consequently applies to the case of the owners of less than a moiety making the request. Now that case is provided for by the third section, in every possible case where the Court thinks a sale is proper, and for the benefit of the parties interested. Therefore the fifth must apply to a case where the Court sees no reason for preferring a sale to a partition. But the Court shall not exercise the new power given by the fifth section, which depends entirely upon the caprice of the person asking, without any opinion of the Court being expressed, if other people will buy. That is a check upon the new power, not, as it has been supposed to be, a limitation of the third and fourth sections." This decision was followed in *Pitt* v. *Jones* (5 App. Cas. 651), overruling *Pemberton* v. *Barnes* (L. R. 6 Ch. 685), *diss.* Lord Hatherley. These cases decide that sect. 5 is not to be read as a proviso qualifying sects. 3 and 4, but as an independent clause, giving an entirely new power to any person who is prepared to sell his own interest to insist for and obtain a decree of sale, unless someone is willing to buy his share. See judgment of Lord Watson, at p. 662. See also *Lys* v. *Lys*, L. R. 7 Eq. 126; *Rowe* v. *Gray*, 5 Ch. D. 263; *Porter* v. *Lopes*, 7 Ch. D. 358.

If the person asking for a sale finds that the others are prepared to buy his share at a valuation, he may withdraw his request for a sale and submit to a partition: *Williams* v. *Games*, L. R. 10 Ch. 204.

The result of the authorities may be thus summed up. The jurisdiction of the Court under the Partition Act is made to depend upon two things, the nature of the property, and the amount of interest possessed by the party requesting a sale. Thus (1) if the property does not readily admit of partition a

sale may be directed, however small may be the interest of the party requesting the sale: sect. 3. (2) Although the property does admit of partition, if the parties entitled to a moiety or upwards request a sale, the Court must direct a sale, unless it sees good reason to the contrary: sect. 4. (3) Although the property does admit of partition, if any party interested in less than a moiety requests a sale, the Court may direct a sale, unless the other parties are willing to purchase the share of the party requesting a sale: sect. 5. If they are willing to purchase, he may withdraw his request, and join in the partition.

Partition where trustees have power of sale.

The existence of a power in trustees to sell the property for the purpose of a division is no bar to the exercise by the Court of its jurisdiction under the Partition Act: *Boyd* v. *Allen*, 24 Ch. D. 622. But where there is a trust for sale, and division of the proceeds among a class, the Court has no jurisdiction under this Act (*Biggs* v. *Peacock*, 22 Ch. D. 284); nor where there are active trusts and powers vested in trustees for the purpose of managing the property, and overriding the ultimate trust in favour of the persons seeking partition or sale: *Taylor* v. *Grange*, 15 Ch. D. 165.

Where the testator has fixed the period at which his trustees are to sell and divide the proceeds, the Court has no jurisdiction to anticipate that period by ordering a sale under the Partition Act: *Swaine* v. *Denby*, 14 Ch. D. 326.

Property subject to a mortgage.

The fact that the property is subject to a mortgage is no bar to partition or sale subject to the mortgage, even though the mortgage is vested in one of the tenants in common: *Waite* v. *Bingley*, 21 Ch. D. 674.

Partition Act, 1876, s. 7.

The Partition Act, 1876 (39 & 40 Vict. c. 17), s. 7, provides that in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

Orders for sale.

An order for sale could not be made at the hearing, unless all persons interested were parties: *Mildmay* v. *Quicke*, L. R. 20 Eq. 537. Now, however, under the Partition Act, 1876, s. 3, the Court can dispense with service on any person. For the form of judgment, see *Senior* v. *Hereford*, 4 Ch. D. 494; *Re Hardiman*, 16 Ch. D. 360.

Chap. VI. s. 1.

A decree may be made for partition of part of an estate, and sale of the rest: *Roebuck* v. *Chadebet*, L. R. 8 Eq. 127.

The costs of a partition action are payable by the parties in proportion to their interests: *Cannon* v. *Johnson*, L. R. 11 Eq. 90; *Ball* v. *Kemp-Welch*, 14 Ch. D. 512.

Redemption and foreclosure actions.

Conveyancing Act, 1881, s. 25.

The Conveyancing and Law of Property Act, 1881, s. 25, repealing sect. 48 of the Chancery Procedure Act (15 & 16 Vict. c. 86), enacts, sub-s. 1, that any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption: sub-s. 2, that in any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee or of any person interested either in the mortgage or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption, or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.

Equitable mortgagees.

This section empowers the Court to order a sale, upon the application of an equitable mortgagee, by deposit of deeds, without any written memorandum giving him a right to a legal mortgage. Such a mortgagee could, before this Act, only come for a foreclosure. See *Backhouse* v. *Charlton*, 8 Ch. D. 444; *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205.

A charge *simpliciter*, and not a mortgage or an agreement for a mortgage, gives a right to a sale and not to a foreclosure (*Tennant* v. *Trenchard*, L. R. 4 Ch. 537); and *semble*, a mortgagee who is also a trustee will not be allowed to foreclose: *Ibid.*

Order for sale.

This section (25) gives the Court jurisdiction to order a sale in a foreclosure or redemption action at any time before the suit is concluded by foreclosure absolute (*Union Bank of London* v. *Ingram*, 20 Ch. D. 463); and the application may be made on motion before the trial: *Woolley* v. *Colman*, 21 Ch. D. 169.

When, at the trial of a foreclosure action, the plaintiff asks

for a sale, the Court, in the absence of the mortgagor, will direct an account of what is due to the plaintiff, and that, on the amount being certified, a sufficient part of the property be sold: *Wade* v. *Wilson*, 22 Ch. D. 235.

Settled Estates Act, 1877.

The jurisdiction of the Court to authorize sales under sect. 16 of the Settled Estates Act, 1877, is not taken away by the Settled Land Act; and, in conjunction with sect. 70 of the Conveyancing Act, 1881, it may still occasionally be resorted to. See *Re Hall Dare's Contract*, 21 Ch. D. 41.

Ord. LI.

Under the Rules of the Supreme Court, 1883, Ord. LI. r. 1, if, in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part thereof should be sold, the Court or a judge may order the same to be sold, and any party bound by the order and in possession of the estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser, or such other person as may be thereby directed.

This rule gives a somewhat wider discretion to the Court than was conferred by 15 & 16 Vict. c. 86, s. 55; repealed 46 & 47 Vict. c. 49, s. 3. And see *De la Salle* v. *Moorat*, L. R. 11 Eq. 8; *Miles* v. *Jarvis*, W. N. 1883, p. 203; *Hyett* v. *Mekin*, 32 W. R. 513.

Conveyancing Act, 1881, s. 70.

By sect. 70 of the Conveyancing Act, 1881, it is enacted that an order of the Court, under any statutory or other jurisdiction, shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice or service, whether the purchaser has notice of any such want or not, see *Re Hall Dare's Contract*, 21 Ch. D. 41.

Sect. 2.—*Conduct of the Sale.*

Directions, how given.

When the order for sale has been made, all further directions as to the manner in which the sale is to be conducted, and as to payment into Court and investment of the purchase-money, will be given on summons at chambers. See R. S. C. 1883, Ord. LV. r. 2 (14).

Manner of sale.

The sale will usually be by public auction, see *Pemberton* v.

Chap. VI. s. 2.

Barnes, L. R. 13 Eq. 349. But it may be by public tender or private contract if the Court so approves. See Daniell's Ch. Pr. p. 1073; and see *Dowle* v. *Lucy*, 4 Hare, 311; *Pimm* v. *Insall*, 10 Hare, App. lxxiv.; *Bousfield* v. *Hodges*, 33 Beav. 90; *Berry* v. *Gibbons*, L. R. 15 Eq. 150.

As to the preparation of the abstract and conditions of sale, and fixing a reserve price, see R. S. C. 1883, Ord. LI. and App. L. 15.

The conditions of sale must specify a time for the delivery of the abstract of title to the purchaser or to his solicitor: Ord. LI. r. 2.

To whom given.

The conduct of the sale is usually given to the plaintiff, but it will be given to any other person if it appears that it will be for the benefit of the parties: *Knott* v. *Cottee*, 27 Beav. 33; and see *Dale* v. *Hamilton*, 10 Hare, App. vii. When the Court has decided to whom the conduct of the sale is to be given, no other person will be permitted to interfere: *Dean* v. *Wilson*, 10 Ch. D. 136.

Leave to bid.

The party having the conduct of the sale cannot bid at the auction, nor will leave be given him to do so, whether he be a party entitled to a share of the property (*Sidny* v. *Ranger*, 12 Sim. 118), or a mortgagee (*Domville* v. *Berrington*, 2 Y. & C. Ex. 723; *Ex parte McGregor*, 4 De G. & Sm. 603), or a trustee (*Campbell* v. *Walker*, 5 Ves. 678; *Tennant* v. *Trenchard*, L. R. 4 Ch. 537), or the solicitor to any such person (*Guest* v. *Smythe*, L. R. 5 Ch. 551), or his agent (*Martinson* v. *Clowes*, 21 Ch. D. 857). But any such person may, if the property is not sold at the auction, afterwards be permitted to become the purchaser, if none of the *cestuis que trust* object: *Farmer* v. *Dean*, 32 Beav. 327; *Tennant* v. *Trenchard*, L. R. 4 Ch. 537.

The proper course to be pursued by any party to the action who desires to become the purchaser, is to obtain leave to bid at the sale. If he purchases without obtaining leave, the sale may be set aside, or the property may be ordered to be put up at the price he bid for it, and if it is not then sold for more, he may be held to his bidding: *Sidny* v. *Ranger*, 12 Sim. 118; and see *Elworthy* v. *Billing*, 10 Sim. 98; *Nelthorpe* v. *Pennyman*, 14 Ves. 517.

The Partition Act, 1868, s. 6, authorizes the Court to allow any of the parties interested to bid at the sale on such terms as the Court thinks reasonable.

Purchaser must not mislead the Court.

When a party having leave to bid is declared the purchaser, and the contract has been approved, any fiduciary relation in which he may have formerly stood, *e. g.*, as solicitor, is put an end to, and he is placed in the position of a mere stranger: *Boswell* v. *Coaks*, 23 Ch. D. 302. This statement of the law seems to be recognized as sound by the Lords Justices in the same case in the Court of Appeal (27 Ch. D. 424); but they there held that any person, whether a stranger or one who had been in a fiduciary capacity, desirous of buying property sold under the direction of the Court, must either abstain from laying any information before the Court in order to obtain its approval, or he must lay before it all the material information he possesses.

Purchaser must sign contract.

The purchaser must, at the time of sale, subscribe his name and address to his bidding (see 3rd condition of sale in R. S. C. 1883, App. L. 15); but it is not necessary that the contract should be signed by the vendors, they being bound by the order for sale: see p. 3.

Certificate of result.

The result of the sale is verified by the affidavit of the auctioneer (see R. S. C. 1883, App. L. 16), and certified by the chief clerk. The certificate has to be filed, and then becomes binding. See R. S. C. 1883, Ord. LV. rr. 65—71.

Opening biddings.

At one time it was a frequent practice of the Court to open the biddings, if the price bid was not considered adequate, or a better offer was made. This, however, was abolished by the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), s. 7, except on the ground of fraud. See *Griffiths* v. *Jones*, L. R. 15 Eq. 279; *Delves* v. *Delves*, L. R. 20 Eq. 77. This section equally applies to sales under the Court by private contract: *In re Bartlett*, 16 Ch. D. 561.

This Act, in the opinion of Lord Justice Fry, has done away with the doctrine recognised in *Ex parte Minor*, 11 Ves. 559; *Twigg* v. *Fifield*, 13 Ves. 517; *Robertson* v. *Skelton*, 12 Beav. 260, that until the certificate had become binding the purchaser was not in the position of owner, and, therefore, any loss to the property, as by fire, occurring in the meantime, fell upon the vendor. See Fry, Spec. Perf. p. 399.

Sect. 3.—*Payment of Purchase-Money.*

Order for payment into Court.

The purchase-money is, under an order for that purpose to be obtained by the purchaser, to be paid into Court to the credit of the action, see the 8th condition of sale in R. S. C. 1883, App. L. 15, which also provides that upon payment the purchaser is to be entitled to possession, or to receipt of the rents and profits, as from the day fixed by the conditions of sale, down to which time all outgoings are to be paid by the vendors.

As to the manner of paying money into Court, see the Supreme Court Funds Rules, 1884, rr. 5 *et seq.*

If no time is fixed by the conditions, the purchaser will be entitled to the profits as from the quarter-day preceding the payment of the purchase-money (*Anson* v. *Towgood*, 1 Jac. & W. 637); except in the case of a purchase of a trading concern, as a colliery, when the purchaser is entitled to the profits as from the month or week in which the purchase takes place, according to the course of taking accounts: *Wren* v. *Kirton*, 8 Ves. 502.

Payment without prejudice.

The purchaser will be permitted, if there are sufficient grounds for his application, to pay the purchase-money into Court without prejudice to any questions upon the title, in order to save payment of interest: *Rutley* v. *Gill*, 3 De G. & S. 640; and see *De Visme* v. *De Visme*, 26 Beav. 630; 1 Mac. & G. 336. But this will not be permitted without special reason: *Ouseley* v. *Anstruther*, 11 Beav. 399; and see *Denning* v. *Henderson*, 1 De G. & S. 689. And in no case will the purchaser be allowed to pay the purchase-money into Court and take possession without accepting the title: *Hutton* v. *Mansell*, 2 Beav. 260; *Rutter* v. *Marriott*, 10 Beav. 33.

Notice to purchaser of dealings with money paid in.

The money so paid into Court will not be dealt with without notice to the purchaser, and the order to pay the money into Court should be lodged at the pay office, for the purpose of being entered on the books as a stop order: Seton, pp. 1399, 1406.

If the money is being dealt with before the purchaser has obtained his conveyance, he will be entitled to his costs of appearance, even though he does not oppose the application: *Bamford* v. *Watts*, 2 Beav. 201; *Noble* v. *Stow*, 30 Beav. 272.

Secus, if he has obtained his conveyance: *Barton* v. *Latour*, 18 Beav. 526. The vendor, on delivery of the conveyance to the purchaser, should obtain from him a written acknowledgment, and an authority to concur in his name in the distribution of the purchase-money by the Court. See Seton, p. 1406; Daniell's Ch. P. 1100.

When the purchaser has paid his money into Court he is relieved from all responsibility as to its application: *Todd* v. *Studholme*, 3 K. & J. 324.

Sect. 4.—*Completion of Purchase.*

Necessary parties.

All necessary parties must join in the conveyance to the purchaser. See R. S. C. Ord. LI. r. 3; *Minton* v. *Kirwood*, L. R. 3 Ch. 614.

Legal mortgagees.

This includes legal mortgagees who consent to the sale, and who, by concurring, become entitled to be paid out of the purchase-money, to the full amount of principal, interest, and costs, in priority to the costs of the plaintiff: *Hepworth* v. *Heslop*, 3 Hare, 485; and see *Wickenden* v. *Rayson*, 6 De G., M. & G. 210; *Re Mackinlay*, 2 De G. J. & S. 358. And the mortgagees are paid according to their priorities (*Wild* v. *Lockhart*, 10 Beav. 320), a puisne incumbrancer not being entitled to costs in respect of his concurrence until the prior incumbrancer has been paid in full: *Wonham* v. *Machin*, L. R. 10 Eq. 447.

Conveyancing Act, 1881, s. 5.

Under sect. 5 of the Conveyancing Act, 1881, the Court has power to direct a sum to be set apart and invested to meet any incumbrance on the land, and thereupon, without any notice to the incumbrancer, to declare the land freed from the incumbrance, and make any order for conveyance or vesting order accordingly. This section applies both to sales by the Court and out of Court.

Persons having equitable interests.

Persons having merely equitable interests cannot be required to concur, their rights being bound by the decree: *Re Williams' Estate*, 5 De G. & S. 515; *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330.

Legal estate.

But the purchaser will not be compelled to accept an equitable title without the legal estate being got in, except perhaps

Chap. VI. s. 4.

where a dry legal estate is outstanding in an infant: *Freeland* v. *Pearson*, L. R. 7 Eq. 246.

Trustee Acts.

If any person whose concurrence is necessary refuses to execute the conveyance, he may be ordered to do so upon summons (see Daniell's Ch. Pr. 1096); but the more convenient course is to apply for a vesting order under the Trustee Act, 1850, ss. 16, 20, and the Trustee Extension Act, 1852, s. 1 (see *Rowley* v. *Adams*, 14 Beav. 130; *Ayles* v. *Cox*, 17 Beav. 584; *Hancox* v. *Spittle*, 3 Sm. & G. 478); or under the Judicature Act, 1884 (47 & 48 Vict. c. 61, s. 14), for an order appointing another person to execute.

Sect. 30 of the Trustee Act, 1850, is expressly incorporated by sect. 7 of the Partition Act, 1868. And sect. 1 of the Trustee Extension Act, 1852, equally applies to sales under the Partition Acts, and is not limited to the cases of persons under disability: *Beckett* v. *Sutton*, 19 Ch. D. 646.

Conveyance.

Unless the parties differ, the conveyance to the purchaser is not as a rule settled by the judge, even though infants are interested as conveying parties, see Seton, p. 1407. This practice, however, did not apply to conveyances under the Settled Estates Act, which were always settled by the judge, whether the parties differed or not: *Re Eyre's Estates*, 4 K. & J. 268.

Title deeds.

The right of the purchaser to the title deeds is the same as in the case of an ordinary sale out of Court, see p. 302. If the deeds are in Court they may be ordered to be delivered out to the vendor for the purpose of completion (*Lee* v. *Flood*, cited in Seton, p. 1409), or the purchaser may apply by summons at chambers for the delivery to him of such as he is entitled to: *Ibid.*

Sect. 5.—*Discharge of Purchaser.*

On title proving bad.

If the title proves bad the purchaser is entitled to be discharged on taking out a summons for that purpose. See Daniell's Ch. Pr. p. 1104.

Return of deposit.

In this event he will be entitled to have his deposit returned, with interest at four per cent. (Seton, p. 1412); or, if the money

has been invested, to the stock purchased therewith, together with the dividends: *Powell* v. *Powell*, L. R. 19 Eq. 422.

Costs of investigating title.

He will be paid out of the funds in Court his costs, charges, and expenses, including those of investigating the title, unless it is otherwise provided by the conditions of sale: *Reynolds* v. *Blake*, 2 Sim. & St. 117; *Calvert* v. *Godfrey*, 6 Beav. 97; *Perkins* v. *Ede*, 16 Beav. 268. If there is no fund in Court the plaintiff will be ordered to pay them without prejudice as to how they are ultimately to be borne: *Smith* v. *Nelson*, 2 Sim. & St. 557; *Berry* v. *Johnson*, 2 Y. & C. Ex. 564. A defendant to whom the conduct of the sale has been given will not be ordered to pay them in the first instance: *Mullins* v. *Hussey*, L. R. 1 Eq. 488; and see Seton, p. 1412.

Other grounds for discharge.

The purchaser will also be entitled to be discharged on grounds which would, in the case of an ordinary sale, justify him in resisting specific performance, such as a mistake which renders the contract inequitable (*Savile* v. *Savile*, 1 P. Wms. 745; and see Sug. V. & P. 120), or a condition of sale which is misleading either as to the value of the property (*Dimmock* v. *Hallett*, L. R. 2 Ch. 21; *Torrance* v. *Bolton*, L. R. 8 Ch. 118; *Re Arnold*, 14 Ch. D. 270), or as to the state of the title (*Else* v. *Else*, L. R. 13 Eq. 196; *Re Banister*, 12 Ch. D. 131), or where the contract is tainted with fraud (*Lord Bandon* v. *Becher*, 9 Bli. N. S. 532; 3 Cl. & Fin. 479; *Thornhill* v. *Glover*, 3 Dru. & War. 195; *Bowen* v. *Evans*, 2 H. L. C. 257), unless the purchaser himself has participated in the fraud, see Sug. V. & P. 110.

In fact, in sales by the Court, there should be at least as much good faith shown towards the purchaser as, and perhaps a little more than, is required by ordinary vendors out of Court: per Jessel, M. R., in *Re Banister*, 12 Ch. D. 131, 141.

CHAPTER VII.

SALES UNDER LANDS CLAUSES CONSOLIDATION ACT, 1845.

SECT.		PAGE
1.	*What Lands and Interests may be taken*	170
	i. *Lands*	171
	ii. *Easements*	171
	iii. *Minerals*	172
	iv. *Part of house*	173
	v. *Copyholds*	174
	vi. *Common lands*	174
	vii. *Other interests*	175
2.	*Purchase by Agreement*	176
	i. *With absolute owner*	176
	ii. *With trustees*	176
	iii. *Ascertainment of purchase-money*	177
2.	*Purchase, &c.*—continued.	
	iv. *Time for completion*	179
3.	*Compulsory taking*	180
	i. *The notice*	180
	ii. *Ascertainment of price*	182
	iii. *Payment of purchase-money*	183
4.	*The Conveyance*	183
5.	*Entry on Lands before purchase*	185
6.	*Compensation where Lands injuriously affected*	186
7.	*Sale of superfluous Land*	187

SECT. 1.—*What Lands and Interests may be taken.*

Purchase by agreement and compulsory taking.

A COMPANY or other body authorized to take lands under the Lands Clauses Act may do so in one of two ways, either by agreement with the owners or persons enabled by the Act to sell, or by compulsory taking. They may also in certain events enter upon the lands before purchase for the purpose of executing their works as quickly as possible. In all such cases they must pay for the land they take, with compensation for severance and for damage caused by their works. They must also give compensation in certain cases to persons whose lands though not actually taken by the company are nevertheless injuriously affected by the construction of the works. When the works are completed the company must sell all superfluous land which they do not require for their undertaking. These various subjects will be treated under the several sections of this chapter. The Act itself is divided into different subjects

by headings, which are to be referred to in order to determine the sense of any doubtful expression in a section ranged under any particular heading: *Eastern Counties Ry. Co.* v. *Marriage*, 9 H. L. C. 32; *Hammersmith Ry. Co.* v. *Brand*, L. R. 4 H. L. 171.

But first it is important to consider what lands and interests can be acquired by the company under their powers.

"Lands."

The word "lands" is by sect. 3 made to extend to messuages, lands, tenements, and hereditaments of any tenure. This includes a rent-charge to which lands taken by the company are subject: *In re Brewer*, 1 Ch. D. 409.

The lands must be such as the company are authorized to take according to their deposited plans (see *Wrigley* v. *Lancashire and Yorkshire Ry. Co.*, 4 Giff. 352; *Dowling* v. *Pontypool Ry. Co.*, L. R., 18 Eq. 714), though *quære* whether the Court will interfere if the company takes an extremely small piece of land in excess of its powers: *Ibid.*

Lands must be *bonâ fide* required.

The lands must be *bonâ fide* required for the purposes of the undertaking. The company are not entitled to take land, although within the limits of deviation, merely because the land contains material, such as clay or minerals, which will be useful in making their works: *Bentinck* v. *Norfolk Estuary Co.*, 8 De G. M. & G. 714; *Dodd* v. *Salisbury Ry. Co.*, 1 Giff. 158; *Eversfield* v. *Mid-Sussex Ry. Co.*, 3 De G. & J. 286; *Stockton Ry. Co.* v. *Brown*, 9 H. L. C. 246; *Wilkinson* v. *Hull Ry. Co.*, 20 Ch. D. 323; *Loosemore* v. *Tiverton Ry. Co.*, 22 Ch. D. 25; 9 App. Cas. 480. See also *Rolls* v. *London School Board*, 27 Ch. D. 639.

The evidence of the engineer of the company as to the quantity of land required, or the necessity of its acquisition, is conclusive if it has a reasonable appearance of accuracy: *Kemp* v. *South Eastern Ry. Co.*, L. R. 7 Ch. 364; *Errington* v. *Met. Dist. Ry. Co.*, 19 Ch. D. 559.

Easements.

Whether the company have the right to take an easement, in the sense of creating one for their own use, as by throwing their works over a man's land by means of a bridge, or running them under by means of a tunnel, depends upon the special Act, no such right being given by the Lands Clauses Act. See *Pinchin*

Ch. VII. s. 1.

v. *London & Blackwall Ry. Co.*, 5 De G. M. & G. 851; *Hill* v. *Mid. Ry. Co.*, 21 Ch. D. 143; *G. W. Ry. Co.* v. *Swindon Ry. Co.*, 9 App. Cas. 787.

They will, however, be entitled to the benefit of an easement, as a right of way, appurtenant to land they have purchased, at any rate so long as they only use it for the purposes for which it was previously used: *Bayley* v. *G. W. Ry. Co.*, 26 Ch. D. 434.

If the works of the company destroy or interfere with an easement to which a neighbouring landowner is entitled, the proper remedy is not for the company to purchase the easement, but to give compensation in respect of it under sect. 68. See *post*, p. 186.

As to the power of waterworks companies and corporations to take water and use and divert streams, under the Waterworks Clauses Act, 1847, and the Lands Clauses Act, see *Ferrand* v. *Corporation of Bradford*, 21 Beav. 412; *Bush* v. *Trowbridge Waterworks Co.*, L. R. 10 Ch. 459; *Stone* v. *Corporation of Yeovil*, 2 C. P. D. 99.

A railway company is not authorized, by sect. 16 of the Railways Clauses Act, 1845, permanently to divert the course of a stream merely to save themselves the expense of making a couple of bridges; they may only do so when it is necessary for the construction of the railway: *Pugh* v. *Golden Valley Ry. Co.*, 15 Ch. D. 330.

Minerals.

By sect. 77 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), it is enacted that the company shall not be entitled to any mines or minerals under any land purchased by them, except such parts thereof as shall be necessary to be dug or carried away, or used in the construction of their works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.

This and the following sections have been held to be for the benefit not of the mine owner but of the company, to exempt them from the obligation of buying the minerals together with the surface. The company can compulsorily purchase the

minerals under the land they have taken, and they may do so after they have first purchased the surface on giving a second notice to treat for the minerals: *Errington* v. *Met. Dist. Ry. Co.*, 19 Ch. D. 559.

As to what is included in the word "mines," see *Mid. Ry. Co.* v. *Haunchwood Brick and Tile Co.*, 20 Ch. D. 552, and other cases cited *post*, p. 292.

As to the compensation payable to the owners for not working the minerals, see *Smith* v. *G. W. Ry. Co.*, 3 App. Cas. 165.

If, however, the company elect to buy the land without the minerals, such minerals may be worked as against the company, and the mine owner will not be liable for injury to the company so long as the mine is worked in the proper and usual way (*G. W. Ry. Co.* v. *Bennett*, L. R. 2 H. L. 27); and the same rule extends to a purchaser of superfluous land from a company: *Pountney* v. *Clayton*, 11 Q. B. D. 820.

But under sects. 78 and 79 of the Railways Clauses Act, the owner of the minerals must give notice to the company of his intention to work them, and thereupon the company, if they think fit, may purchase the minerals.

As to the rights and powers of waterworks companies over minerals, see sects. 18—27 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17).

Part of a house.

A person cannot be required to sell or convey to the company a part only of any house or other building or manufactory, if he be willing and able to sell and convey the whole: sect. 92.

Under this section a house has been held to include all that would pass by the demise or conveyance of a house, but that does not include land which is only convenient but not necessary to be held therewith: *Lord Grosvenor* v. *Hampstead Ry. Co.*, 1 De G. & J. 446; *St. Thomas' Hospital* v. *Charing Cross Ry. Co.*, 1 J. & H. 400; *Steele* v. *Midland Ry. Co.*, L. R. 1 Ch. 275; *Siegenberg* v. *Met. Dist. Ry. Co.*, 32 W. R. 333.

However, a company have been held bound to purchase, together with the house, land which formed an approach for vehicles: *Marson* v. *L. C. & D. Ry. Co.*, L. R. 6 Eq. 101; 7 Eq. 546.

Garden.

So where the company proposed to take a piece of garden

Ch. VII. s. 1.

which was used partly for nursery and partly for ornamental purposes, they were held bound to take also the dwelling-house: *Salter* v. *Met. Dist. Ry. Co.*, L. R. 9 Eq. 432; and see *Hewson* v. *L. & S. W. Ry. Co.*, 8 W. R. 467; *Cole* v. *West London Ry. Co.*, 27 Beav. 242; *Alexander* v. *Crystal Palace Ry. Co.*, 30 Beav. 556; *Fergusson* v. *L. B. & S. C. Ry. Co.*, 33 Beav. 103; 3 De G. J. & S. 653; *Falkner* v. *Somerset Ry. Co.*, L. R. 16 Eq. 458; *Barnes* v. *Southsea Ry. Co.*, 27 Ch. D. 536.

Manufactory.

So, too, if the company requires a manufactory, they can be compelled to take also the lands and buildings used therewith. See *Spackman* v. *G. W. Ry. Co.*, 1 Jur. N. S. 790; *Sparrow* v. *The Oxford, &c. Ry. Co.*, 2 De G. M. & G. 94; *Schwinge* v. *The London & Blackwall Ry. Co.*, 3 Sm. & G. 30; *Furniss* v. *Midland Ry. Co.*, L. R. 6 Eq. 473; *Richards* v. *Swansea, &c. Co.*, 9 Ch. D. 425.

The section does not apply where the company are not taking part of a corporeal hereditament, but only require a right or easement of carrying their works over the land: *Pinchin* v. *The London & Blackwall Ry. Co.*, 5 De G. M. & G. 851.

Less than half an acre.

By sect. 93 it is enacted that if the company by their works cut off from land a piece less than half an acre, and not being situate in a town or built upon, the owner can compel them to purchase the whole. See *Falkner* v. *Somerset Rail. Co.*, L. R. 16 Eq. 458.

Enfranchisement of copyholds.

If the company purchase copyhold lands, they must, under sects. 95—98, enfranchise them. The conveyance is to be entered on the rolls of the manor, and the land to be enfranchised within three months of enrolment, or within one month from taking possession, and the lord is to be compensated.

As to the fines payable to the lord on the purchase of the copyholder's interest, see *Cooper* v. *Norfolk Ry. Co.*, 3 Exch. 546; *Ecclesiastical Commissioners* v. *London and South Western Ry. Co.*, 14 C. B. 743.

A company enfranchising under these sections is not bound by the provisions of the Enfranchisement Acts: *Re Wilson's Estate*, 2 J. & H. 619.

Common lands.

Sects. 99—107 provide for the case of common lands. The lord of the manor and all commoners are to be com-

pensated, and thereupon the rights of common and other rights are to be extinguished. See also 45 & 46 Vict. c. 15.

As to what is a right of common entitling to compensation, see *Nash* v. *Coombs*, L. R. 6 Eq. 51; *Fox* v. *Amhurst*, L. R. 20 Eq. 403; *Austin* v. *Amhurst*, 7 Ch. D. 689.

A commoner may maintain an action against the company if they disturb his rights of common without having first paid compensation in respect of such rights: *Stoneham* v. *L. B. & S. C. Ry. Co.*, L. R. 7 Q. B. 1.

Interests of mortgagees.

Sect. 108 provides that with respect to lands subject to a mortgage, it shall be lawful for the company to purchase or redeem the interest of the mortgagee of any such lands which may be required for the purposes of the special Act, and that whether they shall have previously purchased the equity of redemption of such lands or not, and whether the mortgagee thereof be entitled thereto in his own right or in trust for any other party, and whether he be in possession of such lands by virtue of such mortgage or not, and whether such mortgage affect such lands solely or jointly with any other lands not required for the purposes of the special Act. See *Martin* v. *L. C. & D. Ry. Co.*, L. R. 1 Ch. 501; *Pile* v. *Pile*, 3 Ch. D. 36.

Sects. 109—114 provide in detail for ascertaining the compensation to be paid to the mortgagee in certain cases, and for vesting the estate and interest of the mortgagee in the company.

Lands subject to rent-charges.

Sects. 115—118 provide for the release of lands charged with any rent service, rent-charge, or chief or other rent, or other payment or incumbrance not before provided for.

Interests of lessees.

Sects. 119—122 provide for the manner in which, when the land taken is subject to leases, the lessees or tenants are to be compensated. If the tenant has no greater interest than a tenancy from year to year, the compensation is to be determined by two justices in case the parties differ: sect. 121. .

A schoolmaster entitled to reside in the school-house, so long as he is schoolmaster, but liable to be removed, has no greater interest than a tenancy from year to year: *Reg.* v. *Manchester, &c. Ry. Co.*, 4 E. &. B. 88.

Ch. VII. s. 1.

An unexpired residue of less than a year is within sect. 121: *Reg.* v. *G. N. Ry. Co.*, 2 Q. B. D. 151.

A written agreement equivalent to a lease is within sect. 119, and not within sect. 121 (*Sweetman* v. *Met. Ry. Co.*, 1 H. & M. 543); so is an agreement to let, so long as the tenant desires to remain and pays his rent when due: *Re King's Leasehold Estates*, L. R. 16 Eq. 521.

As to the manner in which compensation is to be estimated, see *Cranwell* v. *Mayor of London*, L. R. 5 Ex. 284; *Tyson* v. *Mayor of London*, L. R. 7 C. P. 18.

Where a lease contains a proviso against assignment, without the licence of the lessor, the necessity for such licence is taken away by the Act: *Slipper* v. *Tottenham, &c. Ry. Co.*, L. R. 4 Eq. 112. And the same rule applies with regard to apportionment of rent: *Ibid.*

Interests omitted to be purchased.

Sects. 124—126 provide for the purchase of interests which the company shall, through mistake or inadvertence, have failed or omitted to purchase. See *Hyde* v. *Corporation of Manchester*, 5 De G. & S. 249; *Martin* v. *L. C. & D. Ry. Co.*, 1 Ch. 501; *Stretton* v. *G. W. Ry. Co.*, L. R. 5 Ch. 751.

Sect. 2.—*Purchase of Lands by Agreement.*

Agreement with absolute owner.

Where the person selling is an absolute owner, he and the company can agree upon the price, see sect. 6. But where the persons selling are under disability they are empowered, by sect. 7, to sell and convey, and the price must be fixed under sect. 9.

Agreement with persons under disability.

By sect. 7, the persons under disability are defined as all parties being seised, possessed of, or entitled to any such lands, or any estate or interest therein; and particularly including among such persons all corporations, tenants in tail or for life, married women seised in their own right or entitled to dower, guardians, committees of lunatics and idiots, trustees or feoffees in trust for charitable or other purposes, executors and administrators, and all parties for the time being entitled to the receipt of the rents and profits of any such lands in possession, or subject

to any estate in dower, or to any lease for life or for lives and years or for years, or any less interest.

Equitable tenant for life.

This section enables an equitable tenant for life to sell to the company, and to bind all those in remainder or expectancy, but the trustees having the legal estate are necessary parties to the conveyance: *Lippincott* v. *Smyth*, 29 L. J. Ch. 520.

Provision against alienation.

Where a tenant for life was subject to a provision in his settlement against alienation, with a limitation over in case of infraction, it was nevertheless held that he could sell to the company, the purchase-money being liable to reinvestment in land: *Devenish* v. *Brown*, 2 Jur. N. S. 1043. Such a provision now would be wholly inoperative; see Settled Land Act, 1882, sect. 51.

But in the case of an inalienable estate tail limited to a man and the heirs of his body, with a reservation to the Crown on failure of issue, though the tenant in tail can, under sect. 7, sell and convey to the company so as to bar his heirs in tail, the Crown would not be bound, not being specially named in the Act; and the concurrence of the Crown is necessary for an effectual conveyance: *Re Cuckfield Burial Board*, 19 Beav. 153.

Ascertainment of purchase-money.

Sect. 9 provides that the purchase-money or compensation to be paid for any lands to be taken from any party under any disability or incapacity, and not having power to sell or convey such lands except under the provisions of the Lands Clauses Act or the special Act, shall not, except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices under the provision thereinafter contained, be less than shall be determined by the valuation of two able practical surveyors, one to be nominated by each side, or, if they cannot agree, by a third surveyor appointed by two justices.

It seems that now all tenants for life and persons having the powers of a tenant for life under the Settled Land Act, 1882, must be excepted from the operation of the 7th and 9th sections of the Lands Clauses Act, as not being parties "not having power to sell or convey, except under the provisions of this (the Lands Clauses Act) or the special Act."

The proper mode of ascertaining the price under the 9th

Ch. VII. s. 2.

section is for the persons selling first to fix the price by agreement, and then to ascertain its sufficiency by valuation, or, as is the ordinary practice, for the surveyors first to fix the price, and then the price being fixed, for the persons selling to adopt it, if they think the price of the surveyors is a good price. A contract by them to sell at a price to be fixed by two surveyors is not *per se* enforceable; see the judgment of Hall, V.-C., in *Peters* v. *Lewes Ry. Co.*, 16 Ch. D. 703, and of Jessel, M. R., in the same case on appeal, 18 Ch. D. 429.

Unless the provisions of this section are strictly complied with specific performance cannot be decreed: *Wycombe Ry. Co.* v. *Donnington Hospital*, L. R. 1 Ch. 268; but see *Baker* v. *Met. Ry. Co.*, 31 Beav. 504.

Sale for a rent-charge.

The sale may be made in consideration of an annual rentcharge, to be charged on the tolls or rates payable under the special act. See sects. 10 and 11, and 23 & 24 Vict. c. 106, ss. 1—4.

A vendor under these sections will not be entitled to a lien on the land for unpaid arrears of his rentcharge: *Earl of Jersey* v. *Briton Ferry Dock Co.*, L. R. 7 Eq. 409. As to his remedies by entry and distress, see *Eyton* v. *Denbigh Ry. Co.*, L. R. 6 Eq. 14, 7 Eq. 439; *Forster* v. *Manchester Ry. Co.*, W. N. 1880, p. 63.

Price.

An agreement by a landowner to sell a certain quantity of land at so much per acre, and as much more at the same price as the company may require, only entitles the company to take any further quantity at that price within the period limited for completion of their works: *Rangeley* v. *Mid. Ry. Co.*, L. R. 3 Ch. 306; *Kemp* v. *S. E. Ry. Co.*, L. R. 7 Ch. 364.

Interest.

A tenant for life is not taking an unfair advantage of his position if he stipulates for interest at 5 per cent. until a conveyance shall be executed: *Re Hungerford*, 1 Jur. N. S. 845; and see *Ex parte Earl of Hardwicke*, 1 De G. M. & G. 297.

The contract may provide for an increasing rate of interest if the purchase-money is not paid by a certain day, and such a stipulation will not be regarded in the light of a penalty: *Herbert* v. *Salisbury Ry. Co.*, L. R. 2 Eq. 221; and see *Pryse* v. *Cambrian Ry. Co.*, L. R. 2 Ch. 444.

Instalments.

But a contract to pay by instalments, and if any instalment is not paid that the owner may retake possession without repaying any instalments, is in the nature of a penalty, against which relief will be given, otherwise it would be *ultra vires*: *Re Dagenham Dock Co.*, L. R. 8 Ch. 1022.

Time for completion.

If the contract does not provide a time for completion, the company are nevertheless bound to complete within a reasonable time; they cannot delay until the time limited for their compulsory powers has nearly expired. If they attempt to delay matters by refusing to appoint a surveyor in accordance with the Act to ascertain the price, the Court will direct an inquiry whether the price agreed upon by a person under disability is reasonable: *Baker* v. *Met. Ry. Co.*, 31 Beav. 504. But if the parties have expressly agreed that the price shall be ascertained either by arbitration or by a jury, at the option of the vendor, and the vendor dies before having exercised such option, there is no contract which the Court can enforce: *Morgan* v. *Milman*, 3 De G. M. & G. 24.

Relative positions of vendor and company.

The relative positions of the parties under an agreement made under the Lands Clauses Act were very fully considered by Jessel, M. R., in *Re Pigott and The G. W. Ry. Co.*, 18 Ch. D. 146. He there says, p. 150: "The course of decision has been, that after notice to treat has been given, and the price has been fixed but has not been paid, a contract is established which is enforceable in a Court of Equity, and on which an action for specific performance can be maintained. That being so, all the ordinary rules apply. Consequently, where the vendor has shown his title, the purchaser pays interest from the time at which he might prudently have taken possession, supposing it to have been offered to him—that is, the time when a good title was shown. That is the ordinary rule." The learned judge then proceeded to dispose of the argument that the company was not in the position of an ordinary purchaser, and, disapproving the case of *Re Eccleshill Local Board*, 13 Ch. D. 365, ordered the company to pay interest at 4 per cent. on the purchase-money from the time when they might have taken possession on a good title being shown: and see *Galliers* v. *Met. Ry. Co.*, L. R. 11 Eq. 410.

So, where the purchase-money for leaseholds has been paid, the company can be compelled to complete by accepting an assignment with the usual covenants: *Harding* v. *Met. Ry. Co.*, L. R. 7 Ch. 154.

Where a lessee contracted to sell to a company, the price, in case of difference, to be referred to an arbitrator, it was held that the relation of vendor and purchaser was not established until the price was ascertained, and that the lessee must pay the outgoings till the date of the award, and was not entitled to interest on the purchase-money till that date: *Catling* v. *G. N. Ry. Co.*, 18 W. R. 121.

Where the amount of compensation awarded by an arbitrator was paid into Court, and the amount was afterwards increased on a traverse of the award, the company was held liable to pay interest at 4 per cent. upon the difference from the time when they took possession: *Re Navan and Kingscourt Ry. Co.*, I. R. 10 Eq. 113.

The vendor may be ordered to pay an occupation rent, if he remains in possession, while the company are paying interest: *Met. Ry. Co.* v. *Defries*, 2 Q. B. D. 387; and see *Leggott* v. *Met. Ry. Co.*, L. R. 5 Ch. 716.

Costs of contract.

Where the land is purchased by agreement, the cost of the preparation and execution of the contract will not be payable by the company, unless expressly stipulated, such costs not being included under sect. 82. See Dav. Conv. II. 91; *Doulton* v. *Metropolitan Board of Works*, L. R. 5 Q. B. 333.

Sect. 3.—*Compulsory Taking of Lands.*

If the company cannot come to an agreement for the purchase of the lands, then it is necessary for them to have recourse to their compulsory powers.

Notice to be given.

Sect. 18 requires the company to give notice to all the persons interested in the lands, or enabled to sell and convey, demanding particulars of their claims, stating what lands are required, and offering to treat for compensation.

Fixes quantity of land.

The notice to treat fixes the land required by the company,

and they cannot require the purchase-money to be assessed of more or less than is mentioned in the notice: *Stone* v. *Commercial Ry. Co.*, 4 My. & Cr. 122; and see *Kemp* v. *London and Brighton Ry. Co.*, 1 Ra. Cas. 495. If they require more land they may give a further notice: *Stamps* v. *Birmingham Ry. Co.*, 7 Hare, 251.

The land being thus fixed, the purchase-money for the whole must be ascertained at one time, the company cannot summon a jury to assess the value of part only: *Ecclesiastical Commissioners* v. *Commissioners of Sewers*, 14 Ch. D. 305; nor can they enter upon part, and deposit the value of and give security for such part only: *Barker* v. *North Staffordshire Ry. Co.*, 2 De G. & S. 55. As to a *bonâ fide* mistake as to the property required, see *Wood* v. *Charing Cross Ry. Co.*, 33 Beav. 290.

Notice alone does not constitute contract,

But, though the notice to treat fixes the land to be taken, it does not, for all purposes, place the parties in the position of vendor and purchaser. The Act does not treat the notice as constituting a contract which can be specifically performed, but as a preliminary step, bringing the parties together who are afterwards to settle the matter between them by agreement, arbitration, or the verdict of a jury: *Adams* v. *London and Blackwall Ry. Co.*, 2 Mac. & G. 118, 132.

or operate as conversion.

Nor does the notice operate to convert the real estate into personalty if the vendor dies before completion: *Haynes* v. *Haynes*, 1 Dr. & Sm. 426; *Re Battersea Park Acts*, 32 Beav. 591; and see *Watts* v. *Watts*, L. R. 17 Eq. 217.

Mandamus to proceed.

Whenever, after the notice to treat has been given, the company neglect to have the value of the land assessed within a reasonable time, they can be compelled to do so by mandamus: *Fotherby* v. *Met. Ry. Co.*, L. R. 2 C. P. 188; *Morgan* v. *Met. Ry. Co.*, L. R. 4 C. P. 97.

Specific performance.

As soon, however, as the price has been fixed, specific performance can be decreed either against the vendor (*Regent's Canal Co.* v. *Ware*, 23 Beav. 575) or against the company (*Harding* v. *Met. Ry. Co.*, L. R. 7 Ch. 154), but not without a reference as to title: *Gunston* v. *East Gloucestershire Ry. Co.*, 18 L. T. 8.

Where a contract is founded upon a notice to treat, the notice

need not be stamped as an agreement: *Rawlings* v. *Met. Ry. Co.*, 37 L. J. Ch. 824.

Withdrawal of notice.

It has been held, that when once notice has been given the company cannot withdraw from it: *Rex* v. *Hungerford Market*, 4 B. & Ad. 327. But they can do so where, having given notice to take part of a house, they are required to take the whole, under sect. 92: *Grierson* v. *Cheshire Lines Committee*, L. R. 19 Eq. 83; and see *Adams* v. *London and Blackwall Ry. Co.*, 2 Mac. & G. 118.

Interests created after notice to treat.

If, after notice has been given requiring lands, the owner grants a lease of such lands, the lessee will not be entitled to compensation: *Re Marylebone Improvement Act*, L. R. 12 Eq. 389; and, if necessary, an injunction will be granted to restrain him from selling it: *Met. Ry. Co.* v. *Woodhouse*, 34 L. J. Ch. 297.

Equitable mortgagees.

Notice should be served under this section on equitable mortgagees (*Martin* v. *London, Chatham and Dover Ry. Co.*, L. R. 1 Ch. 501), but not on persons entitled to a mere easement: *Thicknesse* v. *Lancaster Canal Co.*, 4 M. & W. 472.

Notices to wrong persons.

If the company, though under a misapprehension as to the owners or persons having power to sell and convey, give notices and treat with the wrong persons, and then take possession of the land, they will be restrained from retaining possession at the suit of the persons really entitled: *Perks* v. *Wycombe Ry. Co.*, 3 Giff. 662.

How price is to be ascertained on compulsory taking.

Sect. 21 provides for the ascertaining of the price, where the company cannot come to an agreement with the parties, and, consequently, have to resort to their compulsory powers. In such a case, if the amount claimed does not exceed 50*l.*, the price is to be settled by two justices under sect. 22. If the amount claimed does exceed 50*l.*, it is to be settled by arbitration, if the person claiming compensation so desire; otherwise, or if the arbitrators or their umpire fail to make their award within the period allowed by the Act (as to which, see *Skerratt* v. *North Staffordshire Ry. Co.*, 2 Ph. 475; *In re Hawley and North Staffordshire Ry. Co.*, 2 De G. & S. 33), then the compensation is to be settled by the verdict of a jury: sect. 23.

Sects. 24—67 provide in detail for the manner in which compensation is to be ascertained under sects. 21, 22, 23. The purchase-money and the damage for severance, if any, are to be separately assessed: sects. 49 and 63.

Payment into Court,

When the amount of the compensation has been ascertained, if it exceeds 200*l.*, and there is no person absolutely entitled or capable of giving a receipt, it must be paid into Court under sect. 69, to be applied for the purposes authorized by that section, or as capital money under the Settled Land Act, 1882, see sect. 32 of that Act. If the amount exceeds 20*l.*, but is less than 200*l.*, it may be paid to trustees: sect. 71; if it does not exceed 20*l.* it may be paid to the party entitled to the rents: sect. 72.

or to trustees, or tenant for life.

On compulsory sale.

Where land is taken compulsorily under the Lands Clauses Consolidation Act, 1845, or any such Act, the purchasers must pay all the expenses of making out the title, see sect. 82, and *Ex parte the Feoffees of Addies' Charity*, 3 Hare, 22.

Sect. 4.—*The Conveyance.*

Conveyance to company or deed poll.

The money having been paid into Court, the owner of the lands, including all parties by the Act enabled to sell and convey, shall, when required, convey the lands to the company. In default thereof, or on failure to make out a good title, the company may execute a deed poll, and thereupon the lands shall vest in them: sect. 75.

The directors of a railway company are not justified in accepting a defective title: *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. C. 331, 363.

Where owner refuses to convey.

If the owner refuses to accept the compensation agreed upon or awarded, or fails to make out his title, or refuses to convey, or is absent from the kingdom, or cannot be found, the money must be paid into Court under sect. 76, and a deed poll executed by the company for vesting the lands in them under sect. 77.

Before adopting this course the company must give the owner the opportunity of making out his title after the amount of

Ch. VII. s. 4.

compensation has been settled, even though he had before failed to do so: *Doe* v. *Manchester, &c. Ry. Co.*, 14 M. & W. 687, 15 M. & W. 314.

"Owner."

By "owner" in this clause is meant a person having some title: *Douglass* v. *L. & N. W. Ry. Co.*, 3 K. & J. 173; and therefore the sections do not apply where a person, though able to make a good title to the greater part, fails altogether to make out any title to a small portion: *Wells* v. *Chelmsford Local Board*, 15 Ch. D. 108. But a possessory title, which may, with the lapse of time, become absolute, is sufficient: *Ex parte Winder*, 6 Ch. D. 696.

Party in possession as owner.

The party in possession as owner is to be deemed to have been entitled to the lands, and consequently to the purchase-money in Court, unless and until the contrary be shown to the satisfaction of the Court: sect. 79.

Thus, a person showing title by adverse possession for upwards of twelve years will be deemed the owner, unless the company shows the contrary, as by adducing evidence of the existence of a person under disability: *In re Metropolitan Street Improvement Act*, 1877, 14 Ch. D. 323; and see *Ex parte Freemen of Sunderland*, 1 Drew. 184; *Re Sterry's Estate*, 3 W. R. 561.

Forms of conveyances.

Section 81 provides that certain forms of conveyances set out in the schedules to the Act are to be effectual to vest the lands thereby conveyed in the company, as therein provided.

As to these forms, it is sufficient to refer to the remark in Frend & Ware's Ry. Prec., p. 122, that companies properly advised do not make use of them.

Costs of conveyances.

Section 82 provides for the costs of conveyances, which are to be borne by the company, and under sect. 83 they may be taxed if they cannot be agreed; but they cannot be taxed after they have been paid by the company: *In re South Eastern Ry. Co.*, 23 Ch. D. 167.

Sect. 5.—*Entry on Lands before Purchase.*

Entry upon lands before payment of purchase-money.

It sometimes happens that the company desire to enter upon the lands for the purpose of commencing their works before the purchase-money has been ascertained and paid. This, however, they must not do (see sect. 84), unless they first obtain the consent of the owner (see the same section), or unless they deposit in Court, by way of security, either the amount claimed or such sum as shall be determined to be the value of such lands by a surveyor appointed by two justices, and also give a bond with two sureties in a penal sum equal to the sum so to be deposited, to secure payment of the purchase-money, when it shall be ascertained, together with interest at 5 per cent. from the time of entry until payment: sect. 85. The money deposited will be repaid to the company when the condition of their bond is fully performed, or otherwise applied for the benefit of the person for whose security it has been deposited: sect. 87.

The company cannot be prevented from entering upon lands under this section, although they do so apparently for the purpose of acquiring a possessory title before the expiration of the time limited for the exercise of their compulsory powers: *Loosemore* v. *Tiverton Ry. Co.*, 9 App. Cas. 480.

A bond given by a railway company under this section need not extend to securing compensation for the minerals: *Ex parte Neath & Brecon Ry. Co.*, 2 Ch. D. 201.

Interest on taking possession.

The company must pay interest at 4 per cent. upon the amount eventually determined to be the purchase-money, or compensation from the time of taking possession, not merely from the time when the amount is ascertained: *Rhys* v. *Dare Valley Ry. Co.*, L. R. 19 Eq. 93.

If the company fail to perform the condition of the bond, the Court can order the deposit to be paid out to the landowner: *Re Mutlow's Estate*, 10 Ch. D. 131.

Ch. VII. s. 6.

SECT. 6.—*Compensation where Lands are Injuriously Affected.*

Sect. 68 provides for compensation being given to all persons in respect of lands, or any interest therein, which shall have been taken or injuriously affected by the company, and for which satisfaction shall not have been made under the other sections of the Act.

Easements.

Under this section compensation will be given to owners of easements over the land taken, as where the works of the company will interfere with ancient lights: *Clark* v. *School Board for London*, L. R. 9 Ch. 120; *Duke of Bedford* v. *Dawson*, L. R. 20 Eq. 353; and see *Eagle* v. *Charing Cross Ry. Co.*, L. R. 2 C. P. 638.

So, where the company's works interfere with a right of unloading on the river's bank, the owner of the easement cannot require them to make a deposit and give a bond under sect. 84, but must apply for compensation in respect of the injury to his lands: *Macey* v. *Met. Board of Works*, 33 L. J. Ch. 377.

Under this section also compensation will be given where a company abstract water from a stream to the prejudice of a riparian owner. See *Stone* v. *Corporation of Yeovil*, 2 C. P. D. 99; *Bush* v. *Trowbridge Waterworks Co.*, L. R. 10 Ch. 459.

Compensation will also be given for damage occasioned by narrowing a highway (*Beckett* v. *Mid. Ry. Co.*, L. R. 3 C. P. 82), or lowering the level of a road (*Reg.* v. *Eastern Counties Ry. Co.*, 2 Q. B. 347), or obstructing the access to a navigable river (*Met. Board of Works* v. *McCarthy*, L. R. 7 H. L. 243), or the approach to a manufactory (*Caledonian Ry. Co.* v. *Walker's Trustees*, 7 App. Cas. 259).

Damage caused by user.

It is now settled that compensation is not payable to anyone, whose lands are not taken, for damage caused not by the construction of the works but by their user after they have been constructed: *Hammersmith Ry. Co.* v. *Brand*, L. R. 4 H. L. 171, overruling *Reg.* v. *Cambrian Ry. Co.*, L. R. 6 Q. B. 422; and see *Hopkins* v. *G. N. Ry. Co.*, 2 Q. B. D. 224, 237; *Truman* v. *L. B. & S. C. Ry. Co.*, 25 Ch. D. 423.

But where part of a man's land is taken, compensation may be given in respect of the depreciation in value of the rest

caused by the use for which the land taken is intended: *Duke of Buccleuch* v. *Met. Board of Works*, L. R. 5 H. L. 418; *Reg.* v. *Essex*, 33 W. R. 214.

Damage to land must be permanent.

In order, however, to found a claim to compensation under this section, there must be an injury and damage to the land itself in which the person claiming compensation has an interest, and the injury and damage must be not merely temporary but permanent: *Met. Board of Works* v. *McCarthy*, L. R. 7 H. L. 243; and see *Reg.* v. *Met. Board of Works*, L. R. 4 Q. B. 358.

Damage must be actionable.

Moreover, the damage must be such as might have been the subject of an action if the company had acted without statutory powers. Thus, no compensation is payable in respect of loss of trade by reason of neighbouring houses being bought and pulled down by the company (*Reg.* v. *Vaughan*, L. R. 4 Q. B. 190), or in respect of loss of trade by diverting traffic (*Ricket* v. *Met. Ry. Co.*, L. R. 2 H. L. 175; and see *Re Wadham and N. E. Ry. Co.*, 33 W. R. 215), or in respect of the interference with the monopoly of a ferry (*Hopkins* v. *G. N. Ry. Co.*, 2 Q. B. D. 224).

Particulars of notice.

The particulars which the landowner must give in his notice for a jury to assess the damage under this section (68), must amount to such reasonable information as to his interest as will enable the company to judge whether they will pay the whole claim, or what amount they ought to offer. If the claimant is an occupier under a lease for years, it is not sufficient for him to state in his particulars that he "holds under a lease:" *Healey* v. *Thames Valley Ry. Co.*, 34 L. J. Q. B. 52.

Sect. 7.—*Sale of Superfluous Lands.*

Sale of superfluous lands.

Sect. 127 provides that with respect to superfluous lands, that is, lands acquired by the company but not required for the purposes of their special act, the company shall, within the prescribed period (if any), or within ten years after the expiration of the time limited for completion of their works, sell such superfluous lands; or, in default of sale, such lands shall vest in the owners of the adjoining lands.

Ch. VII. s. 6.

This section does not apply where the undertaking is abandoned or given up: *Smith* v. *Smith*, L. R. 3 Ex. 282.

What is superfluous land.

Land may become "superfluous" where, upon a wrong estimate, more land has been taken than subsequently turns out to be required; where the company have been forced to take the whole when they only required part; where it has been taken for works afterwards abandoned; where it has been taken for a temporary purpose only: *G. W. Ry. Co.* v. *May*, L. R. 7 H. L. 283.

A strip of land outside the company's hedge, running along the railway, is superfluous land: *Norton* v. *L. & N. W. Ry. Co.*, 13 Ch. D. 268.

But land over a tunnel is not superfluous land: *In re Met. Dist. Ry. Co. and Cosh*, 13 Ch. D. 607; *Rosenberg* v. *Cook*, 8 Q. B. D. 162. Nor is land under a railway arch: *Mulliner* v. *Mid. Ry. Co.*, 11 Ch. D. 611.

Land which, though not immediately required, may yet be wanted for making roads, or building houses for storing goods, or for enlarging the works, is not superfluous, even though in the meantime it is let out: *Betts* v. *G. E. Ry. Co.*, 3 Ex. D. 182; *Hooper* v. *Bourne*, 5 App. Cas. 1. Neither is land superfluous which is required for accommodation works: *Lord Beauchamp* v. *G. W. Ry. Co.*, L. R. 3 Ch. 745.

If the company are likely to require the land at any future time they should not sell it as superfluous land. The sale must be an absolute sale, and they cannot reserve a right of buying it back whenever it may be required for their works: *L. & S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 562.

As to the proportions in which, under this section, superfluous land will vest in the adjoining owners, see *Moody* v. *Corbett*, L. R. 1 Q. B. 510.

The adjoining owners can acquire a title against the company under the Statute of Limitations: *Norton* v. *L. & N. W. Ry. Co.*, 13 Ch. D. 268.

Rights of pre-emption over superfluous lands.

Superfluous lands must, unless they be situate within a town, or be built upon, or used for building purposes, be offered, in the first instance, to the owners of the land from which they were originally severed, and then to the adjoining owners: sect. 128.

See *Astley* v. *Manchester, &c. Ry. Co.*, 2 De G. & J. 453; *Hobbs* v. *Mid. Ry. Co.*, 20 Ch. D. 418.

As to land in a town, or used for building purposes, see *Coventry* v. *L. B. & S. C. Ry. Co.*, L. R. 5 Eq. 104; *Carington* v. *Wycombe Ry. Co.*, L. R. 3 Ch. 377; *L. & S. W. Ry. Co.* v. *Blackmore*, L. R. 4 H. L. 610.

If the company treat the land as superfluous, the right of pre-emption given by sect. 128 at once arises, although the period of ten years, limited by sect. 127, may not have expired: *Carington* v. *Wycombe Ry. Co.*, L. R. 3 Ch. 377.

Lessees of adjoining land have been held to be persons entitled to a right of pre-emption within the section: *Coventry* v. *L. B. & S. C. Ry. Co.*, L. R. 5 Eq. 104.

Land separated by a private road (*Ibid.*), or by a wall (*L. & S. W. Ry. Co.* v. *Blackmore*, L. R. 4 H. L. 610), may be adjoining land within the section.

Land adj. to stat. prohibition not building is freed, when acq? by Co, only for purposes of Co undertaking, and when sold by Co as Sup. Land, this prohibition revives. Bird v. Eggleton 29 Ch D 1012.

CHAPTER VIII.

THE ABSTRACT.

SECT.		PAGE
1.	*The Preparation*	190
2.	*The Contents*	191
3.	*The Title*	193
	i. *Forty years' title*	193
	ii. *Root of title*	193
4.	*Proof of Title*	195
	i. *Production of documents*	195
	ii. *Identity of property*	199
	iii. *Incidental facts*	199

SECT. 1.—*The Preparation.*

Vendor must furnish abstract at his own expense.

THE vendor is bound to furnish to the purchaser an abstract of all the deeds, wills and other instruments which have been executed with respect to the land in question during the whole period over which the title to be shown extends; and if this is not done by a perfect abstract the purchaser may object or require further information, see *Want* v. *Stallibrass*, L. R. 8 Ex. 175, 183. The abstract must be furnished at the vendor's expense, see *Horne* v. *Wingfield*, 3 Scott, N. R. 340; Sug. V. & P. 406.

Abstract of deed not in vendor's possession.

It has indeed been held that by virtue of sub-sect. 6 of sect. 3 of the Conveyancing Act, 1881, the purchaser must bear the expense of abstracting all deeds necessary for making out the vendor's title which are not in the vendor's possession: *Re Johnson and Tustin*, 28 Ch. D. 84. The section is, however, pointed to evidence required by the purchaser "for verification of the abstract, or for any other purpose," and it is submitted that the true construction of the section is to limit it to evidence required for that or a similar purpose, and not to extend it to the abstract of the title itself, which every vendor is bound to furnish. This view is supported by *Moody to Yates*, 28 Ch. D. 661.

One abstract.

Where a purchaser buys several lots held under one title he

is not entitled to more than one abstract, except at his own expense: Conveyancing Act, 1881, s. 3, sub-s. 7.

Purchase by partner.

A partner purchasing the share of the other partner in the real estate is, it seems, entitled to an abstract: *Morris* v. *Kearsley*, 2 Y. & C. Ex. 139; but *quære* whether at the expense of the vendor, unless he expressly so stipulates: *Ibid.*

Solicitor's duty.

The solicitor who, being employed to prepare an abstract, simply copies an old abstract without seeing that it is correct, may be held liable for any damages arising from mistakes: *M'Culloch* v. *Gregory*, 1 K. & J. 286, 291.

To whom abstract belongs.

The purchaser is entitled to the custody of the abstract, and if the contract is completed it becomes his property; if the contract is determined he must return it to the vendor: *Roberts* v. *Wyatt*, 2 Taunt. 268.

Taxation of abstract.

In taxation abstracts were ordinarily passed if each sheet contained eight folios (*In re Walsh*, 12 Bea. 490); and now by the general order under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), Sched. II., the allowance is computed on a scale of eight folios to each brief sheet.

If the solicitor is paid according to the scale provided by that order, the preparation of the abstract will be included under the head "Deducing title to freehold, copyhold, or leasehold property." See Schedule I.

Sect. 2.—*The Contents.*

Perfect abstract.

The abstract should be a perfect abstract, that is to say, an abstract showing a good title (*Morley* v. *Cook*, 2 Hare, 106, 111); but the condition of sale as to delivery of the abstract is satisfied if the abstract shows such title as the vendor had at the time of delivery (*Ibid.*), *i.e.*, a full and fair statement of all the muniments which the vendor has in his possession or power (*Blackburn* v. *Smith*, 2 Exch. 783), subject of course to any special stipulation as to commencement of title.

Complete title.

It is not necessary that the abstract should show a complete title in the vendor; it is sufficient whenever it appears that upon certain acts done the legal and equitable estates will be in the

Ch. VIII. s. 2.

purchaser (*Lord Braybroke* v. *Inskip*, 8 Ves. 417, 436); and the vendor must of course be able to procure a conveyance to the purchaser at the time stipulated: *Boehm* v. *Wood*, 1 Jac. & W. 419; *Stowell* v. *Robinson*, 3 Bing. N. C. 928. Thus it is sufficient if the abstract shows incumbrances which can be got in by the time for completion, as by the mortgagee joining in the conveyance to the purchaser: *Townsend* v. *Champernown*, 1 Y. & J. 449; *Webb* v. *Austin*, 7 Man. & G. 701. And even where the purchase could not be completed by the day fixed, because no notice had been given to pay off the mortgage, the vendor was held to have delivered an abstract, and shown a good title according to the conditions: *Savory* v. *Underwood*, 23 L. T. 141.

Legal estate.

Where the abstract shows a good equitable title in the vendor, with power to get in the legal estate, whether under the Trustee Acts or otherwise, it is unnecessary for the abstract to show the devolution of the legal estate: *Camberwell Building Society* v. *Holloway*, 13 Ch. D. 754; and see *Wynne* v. *Griffith*, 1 Russ. 283; *Avarne* v. *Brown*, 14 Sim. 303; *Berkeley* v. *Dauh*, 16 Ves. 380.

Outstanding terms.

The Act 8 & 9 Vict. c. 112 makes it unnecessary for the vendor to procure the assignment of satisfied terms of years. But the abstract should show the dealings with the term up to the passing of the Act, in order that the purchaser may see whether it came within its operation: *Lyle* v. *Earl of Yarborough*, John. 70; *Shaw* v. *Johnson*, 1 Dr. & Sm. 412; and see *Emery* v. *Grocock*, 6 Mad. 54.

Discharged incumbrances.

If an incumbrance has been created and discharged, such dealings should be shown and not suppressed: *Drummond* v. *Tracy*, John. 608, 612; *Heath* v. *Crealock*, L. R. 10 Ch. 22. This, however, can scarcely apply to mere equitable charges by deposit of deeds with a memorandum, see Dart's V. & P. 5th ed. 300.

Sect. 3.—*The Title.*

A sixty years' title had formerly to be shown, see *Cooper* v. *Emery*, 1 Ph. 388.

By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 1, forty years was substituted for sixty years as the period of commencement of title in the absence of any stipulation to the contrary, and except in cases in which earlier title than sixty years could formerly be required. V. & P. Act, 1874.

Such cases are the sale of an advowson, the title to which must be carried back for at least an hundred years (see 3 & 4 Will. IV. c. 27, s. 33); long leaseholds, in which the creation of the term must be shown, though the enjoyment of the term according to the title need now only be shown for the last forty years (*Frend* v. *Buckley*, L. R. 5 Q. B. 213); tithes and other property held under a grant from the Crown, in which cases the original grant must be shown (see *Walker* v. *Bentley*, 9 Hare, 629); reversionary interests, in which cases the abstract must show their creation. See Dart's V. & P. 5th ed. pp. 293—295. Exceptions.

In the absence of any stipulation to the contrary, an obligation on the part of the vendor to make out a good title is implied: *Clarke* v. *Faux*, 3 Russ. 320; *Hall* v. *Betty*, 4 Man. & Gr. 410. Obligation to make a good title.

This implication may be rebutted by showing that the purchaser knew of the defects before contract (*In re Gloag and Miller's Contract*, 23 Ch. D. 320), or that it was intended he should take whatever title the vendor had: *Godson* v. *Turner*, 15 Beav. 46. May be rebutted.

But if the vendor expressly agrees to make a good marketable title, he will not be permitted to prove that the purchaser as a fact knew that he could not do so: *Barnett* v. *Wheeler*, 7 M. & W. 364; *Cato* v. *Thompson*, 9 Q. B. D. 616.

The title ought, if possible, to commence with a deed and not with a will (*Parr* v. *Lovegrove*, 4 Drew. 170); but a title commencing with a will may be supported by evidence of continued possession: *ibid.*; *Cottrell* v. *Watkins*, 1 Beav. 361. Root of title.

A disentailing assurance is not a satisfactory commencement

Ch. VIII. s. 3.

of title; but if the instrument creating the entail is not forthcoming, such assurance, coupled with continued possession, may be sufficient: *Nouaille* v. *Greenwood*, T. & R. 26.

Reversion to leaseholds.

On the sale of a leasehold interest title need not be shown to the reversion, whether freehold (see Vendor and Purchaser Act, 1874, s. 2, sub-s. 1), or leasehold (see Conveyancing Act, 1881, s. 3, sub-s. 1). But these enactments do not apply to leaseholds for lives; and on the sale of such interests the vendor must show who are the lives in existence: *Anderson* v. *Higgins*, 1 J. & L. 718.

Enfranchised copyholds.

On the sale of enfranchised copyholds the abstract need not show the title to make the enfranchisement (see Conveyancing Act, 1881, s. 3, sub-s. 2), but should trace the copyhold title from the time fixed for commencement to the date of enfranchisement, and thenceforward the title to the freehold.

Award under Inclosure Act.

Where land inclosed under an award made under an Inclosure Act is sold, the vendor must show the title to the land in respect of which the award is made, see Sug. V. & P. 372; *Major* v. *Ward* (5 Hare, 604), unless the contract provides that the title shall commence with the award: *Cattell* v. *Corrall*, 4 Y. & C. Ex. 228.

Tenure of allotment.

An allotment made under an Act not expressly assimilating the portion allotted to the land in respect of which the allotment is made, vests the fee simple in the allottee: *ibid.*; *Doe* v. *Davidson*, 2 M. & S. 175; *Townley* v. *Gibson*, 2 T. R. 701; *Doe* v. *Hellard*, 9 B. & C. 789. But the Act 8 & 9 Vict. c. 118 provides (sect. 94) that allotments made under it shall be held by the same tenure as the land in respect of which the allotment is made.

Land held under an exchange.

Where land, which has been taken in exchange, is contracted to be sold, the question arises whether it is necessary to show title to the land given in exchange. Under an exchange at common law the word "exchange" implied a warranty of title (*Bustard's Case*, 4 Rep. 121); but the Act 8 & 9 Vict. c. 106 enacts (s. 4) that an exchange made by deed after the 1st of October, 1845, shall not imply any condition in law. It seems advisable, however, upon any sale of land taken in exchange, whether by an absolute owner or by a tenant for life under the Settled Land Act, 1882, s. 3, sub-s. 3, or under the Acts for the exchange of

ecclesiastical property, or under Inclosure Acts (see 8 & 9 Vict. c. 118, s. 105), to insert a provision in the contract that the title to the land given in exchange shall not be inquired into, see *Cattell* v. *Corrall*, 4 Y. & C. Ex. 228.

Sect. 4.—*Proof of Title.*

A title is shown when the abstract states all the matters which, if proved, make a good title. The title is made when the matters are proved: *Parr* v. *Lovegrove*, 4 Drew. 170; and the vendor is bound to produce the best evidence reasonably within his reach: *Ibid.* p. 179. See also *Sherwin* v. *Shakspeare*, 17 Beav. 267, 275; 5 De G. M. & G. 517.

Production of documents.

The vendor is bound to verify his title by the production of all the abstracted deeds, which he must either produce himself or procure to be produced. If he means to deprive the purchaser of his right to have the title verified by the production of the deeds, he must make this quite clear by the contract: *Southby* v. *Hutt*, 2 My. & Cr. 207.

The expenses of the production of all documents not in the vendor's possession are, by the Conveyancing Act, 1881, s. 3, sub-s. 6, thrown on the purchaser.

Production in London.

The vendor must produce the documents in his possession either in London or at his residence (Sug. V. & P. 14th ed. p. 429), unless he has stipulated for their production elsewhere: *Rippingall* v. *Lloyd*, 2 N. & M. 410.

Deeds coming from proper custody.

Deeds are proved by the production of the originals, see C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 26. In order to render a written document admissible, it is not necessary to show that it has come from the *most* proper custody; it is sufficient if it come from a place where it might reasonably be expected to be found: per Parke, B., *Croughton* v. *Blake*, 12 M. & W. 205, 208; and see *Bishop of Meath* v. *Marquess of Winchester*, 3 Bing. N. C. 183; *Doe* v. *Phillips*, 8 Q. B. 158.

A deed or will thirty years old coming from the proper custody, and otherwise free from suspicion, proves itself: Taylor

Ch. VIII. s. 4.

Ev. 111, 1565; and a deed attested in the usual form is presumed to have been duly signed, sealed, and delivered: *Ibid.* 169; *McQueen* v. *Farquhar*, 11 Ves. 467.

An ancient document produced from the proper custody, but with the seal missing, was held good evidence: *Mayor of Beverley* v. *Craven*, 2 Moo. & R. 140. And the first skin of a deed, of which the other skin had been cut off and lost, was received in evidence on being produced from the proper custody: *Lord Trimlestown* v. *Kemmis*, 9 Cl. & Fin. 749, 774.

Attestation.

Formerly an attesting witness was sometimes required to prove the deed, see *Laythoarp* v. *Bryant*, 1 Bing. N. C. 421; *Crosby* v. *Percy*, 1 Camp. 303; *Thomson* v. *Miles*, 1 Esp. 184; *Nash* v. *Turner*, *ibid.* 217. But now it is enacted by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 26, that it shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite. Attestation is unnecessary unless it is required by an instrument creating a power, or by some statute: per Lord Selborne, L. C., *Seal* v. *Claridge*, 7 Q. B. D. 516, 519.

22 & 23 Vict. c. 35, s. 12.

With regard to deeds exercising powers of appointment, the Act 22 & 23 Vict. c. 35 has provided, sect. 12, that such deeds, after the 13th of August, 1859, if executed and attested by two witnesses in the usual manner shall be valid, although the instrument creating the power requires some additional form of execution, or attestation, or solemnity.

Deeds requiring special execution.

But, where any special solemnity is required by Act of Parliament, such requirements must be strictly observed. Thus, a deed executed by a married woman, with a memorandum of acknowledgment, under sect. 84 of 3 & 4 Will. IV. c. 74, was not effectual without a certificate of acknowledgment under the 85th section: *Jolly* v. *Handcock*, 7 Exch. 820. This section, however, is now repealed, see Conveyancing Act, 1882, sect. 7 (4).

Secondary evidence of lost deeds.

If the title deeds are lost or destroyed, the purchaser will not be compelled to complete, unless the vendor can furnish sufficient evidence of their contents and execution: *Bryant* v. *Busk*, 4 Russ. 1.

Before, however, he will be permitted to adduce any secondary

evidence, the loss or destruction of the deed must be duly proved: *Watson* v. *Parker*, 2 Ph. 5. For this it is sufficient to show that every reasonable search, though not every possible search, has been made: *Hart* v. *Hart*, 1 Hare, 1.

What is sufficient secondary evidence, where such is allowed to be adduced, will depend upon circumstances. There are no degrees of secondary evidence; but a person entitled to give such evidence may give whatever evidence he can: *Doe* v. *Ross*, 7 M. & W. 102.

Attested copy.

Thus, an attested copy of a deed, taken many years back, where the deed had been inrolled in a public office, was held sufficient evidence of the lost deed, and it would have been held sufficient without attestation: *Harvey* v. *Philips*, 2 Atk. 541. So with a registered memorial of a lost deed: *Hobhouse* v. *Hamilton*, 1 Sch. & L. 207; *Collins* v. *Maule*, 8 Car. & P. 502; *Wollaston* v. *Hakewill*, 3 Man. & Gr. 297; *Cathrow* v. *Eade*, 4 De G. & S. 527.

Counterparts of leases are evidence that the lessor has dealt with the land as owner, and, consequently, of his right to the land: *Clarkson* v. *Woodhouse*, cited 5 T. R. 412.

Recitals.

Recitals in deeds, coupled with undisputed possession for a sufficient period, are good secondary evidence of the contents of lost deeds: *Prosser* v. *Watts*, 6 Mad. 59; *Alexander* v. *Crosby*, 1 J. & L. 666; *Gillett* v. *Abbott*, 7 A. & E. 783; *Moulton* v. *Edmonds*, 1 De G. F. & J. 246. And now, by the Vendor and Purchaser Act, 1874, sect. 2, recitals in deeds twenty years old are made sufficient evidence, except so far as they are proved to be inaccurate.

In *Emery* v. *Grocock* (6 Mad. 54), it was held that subsequent dealings with an estate for a considerable period, as if it was unencumbered, afforded sufficient evidence that a term for raising portions had been surrendered; and see *Chalmer* v. *Bradley*, 1 Jac. & W. 51, 63; *Garrard* v. *Tuck*, 8 C. B. 231, 248.

Presumption as to stamp on lost deed.

Where an instrument is lost and secondary evidence of its contents is tendered, the presumption is that it was properly stamped. If, however, it is shown not to have been stamped at the time of its execution, the party relying upon it must adduce evidence to show that it was subsequently stamped; and if no

Ch. VIII. s. 4.

sufficient evidence is forthcoming, the conclusion must be that it remained unstamped: *Marine Investment Co.* v. *Haviside*, L. R. 5 H. L. 624.

In such a case no evidence of its contents can be accepted, even though it has been destroyed by the wrongful act of the party taking the objection: *Rippiner* v. *Wright*, 2 B. & Ald. 478; and see *Smith* v. *Henley*, 1 Ph. 391; *Blair* v. *Ormond*, 1 De G. & S. 428; *May* v. *May*, 33 Beav. 81.

Wills.

Previously to the Probate Act of 1857, 20 & 21 Vict. c. 77, questions frequently arose as to whether the purchaser could require the will to be established as against the heir, or could require the concurrence of the heir in the conveyance. Strictly speaking, the will required to be proved by the production of the witnesses, in order to establish it against the heir: *Colton* v. *Wilson*, 3 P. Wms. 190. This was very often not done. But the Court readily laid hold of special circumstances to enable it to decide that such proof was not necessary, see *Colton* v. *Wilson*, 3 P. Wms. 190; *Wakeman* v. *Duchess of Rutland*, 3 Ves. 234; *Bringloe* v. *Goodson*, 5 Bing. N. C. 738; *Dorrett* v. *Meux*, 15 C. B. 142.

Thus it was held that a will thirty years old, and produced from the proper custody, was sufficiently proved (*Man* v. *Ricketts*, 7 Beav. 93, affirmed 1 H. L. C. 472); and finally it was decided that the purchaser could not require the will to be established, or to have the concurrence of the heir in the conveyance, unless there were reasonable grounds for doubting the validity of the will: *McCulloch* v. *Gregory*, 3 K. & J. 12. As to what are reasonable grounds of suspicion, see *Weddall* v. *Nixon*, 17 Beav. 160; *Grove* v. *Bastard*, 2 Ph. 619, 1 De G. M. & G. 69.

Now by the Act of 20 & 21 Vict. c. 77, it is provided, sect. 62, that wills proved in solemn form shall be binding on persons interested in the real estate, and by sect. 64 that the probate or office copy shall be evidence, save when the validity of the will is put in issue.

The purchaser can require the production of a will, even though it is alleged by the vendor to be void: *Stevens* v. *Guppy*, 2 Sim. & St. 439; and see *Howarth* v. *Smith*, 6 Sim. 161.

The same rules apply to the proof of wills dealing with copy-

holds, as to which see *Jervoise* v. *Duke of Northumberland*, 1 Jac. & W. 559; *Archer* v. *Slater*, 10 Sim. 624, 11 Sim. 507. The production of the probate or an office copy is now nearly always accepted as sufficient.

Identity of property.

If any difficulty is apprehended in identifying the property with the descriptions in the documents, by reason of alterations having taken place, *e.g.*, by planting, cutting down trees, or building, it is advisable by condition to prevent the purchaser from taking any objection on that account, and to offer at his expense a statutory declaration that the property has been enjoyed for a certain number of years in accordance with the title shown. Under such a condition a purchaser was held, in an action for specific performance, entitled not only to the statutory declaration offered, but also to an affidavit to the effect that the particulars afforded by the declaration as to identity of the premises was the best evidence which the vendor could give: *Bird* v. *Fox*, 11 Hare, 40, 48.

Incidental facts.

The vendor must be prepared to prove the truth of all facts necessary to make out his title. It depends entirely upon the circumstances of the particular case what proof will be sufficient.

Births, deaths and marriages.

With regard to births, deaths, and marriages, extracts from the parish registers are generally considered the most satisfactory evidence. Such extracts are not proof of the date of birth or death, but only of baptism and burial, but they are proof of the date of marriage: *Doe* v. *Barnes*, 1 Moo. & R. 386; *Re Wintle*, L. R. 9 Eq. 373.

Certificates from the parish registers of baptisms, marriages, and burials are admissible as evidence without proof of the identity of the persons mentioned in them, see *Hubbard* v. *Lees*, L. R. 1 Ex. 255.

Where the original parish registers are proved to be lost, secondary evidence of their contents may be adduced: *Walker* v. *Beauchamp*, 6 Car. & P. 552.

By the Act 3 & 4 Vict. c. 92, non-parochial registers deposited in the custody of the Registrar-General were made evidence in courts of law.

Extracts from the general registers of births, deaths, and marriages are also evidence.

Ch. VIII. s. 4.

Recitals of births, deaths, and marriages in deeds used not to be considered sufficient evidence if unsupported (*Fort* v. *Clarke*, 1 Russ. 601), and the same with recitals in a private Act of Parliament: *Cowell* v. *Chambers*, 21 Beav. 619. But now, by the Vendor and Purchaser Act, 1874, sect. 2, sub-s. 2, such recitals in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old are made sufficient evidence except so far as they are proved to be inaccurate.

CHAPTER IX.

TITLE UNDER THE STATUTES OF LIMITATION.

SECT.		PAGE	SECT.		PAGE
1.	*Extinguishment of Right*	201	3.	*Express Trust and Fraud*	206
2.	*Arrears of Rent and Interest*	205			

SECT. 1.—*Extinguishment of Right.*

THE Statutes of Limitation now in force are 3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57. They must be construed together, see sect. 9.

Title forced on purchaser.

A purchaser can be compelled to accept a title acquired by adverse possession under the Statutes of Limitation, at all events where he will have a good equitable title independently of the statute, and the legal estate if outstanding is barred: *Scott* v. *Nixon*, 3 Dru. & War. 388. And in the case of *Games* v. *Bonnor* (33 W. R. 64), where a vendor had contracted to give a title of more than twenty years, and it was discovered that an estate tail created eighty years previously had never been barred, it was held that he could show that he had acquired title by adverse possession for twelve years, and that the purchaser must complete. In this case the twelve years did not expire until after the date of the contract.

Right extinguished,

"There is a marked distinction between the old Statutes of Limitation, and the present one (3 & 4 Will. IV. c. 27, s. 34). The former statutes only barred the remedy, but did not touch the right; possession at all times gave a certain right; but under the new Act, when the remedy is barred, the right and title of the real owner are extinguished, and are in effect transferred to the person whose possession is a bar:" per Lord St. Leonards, *Incorporated Society* v. *Richards*, 1 Dru. & War. 258, 289.

and cannot be revived.

When once the right is barred by the statute no subsequent

Ch. IX. s. 1.

acknowledgment will revive it. This is now settled by *Re Alison*, 11 Ch. D. 284; *Sanders* v. *Sanders*, 19 Ch. D. 373, correcting on this point, *Stansfield* v. *Hobson*, 3 De G. M. & G. 620; and see *Markwick* v. *Hardingham*, 15 Ch. D. 339.

Real Property Limitation Act, 1874.

The Real Property Limitation Act, 1874, which came into operation on the 1st January, 1879, reduced the period of limitation from twenty to twelve years.

Right barred after twelve years.

By the first section it is enacted that after the commencement of the Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

Successive occupations.

The twelve years may be made up by the successive possession of independent trespassers (*Dixon* v. *Gayfere*, 17 Beav. 421), or of persons claiming under one another, as where a person having taken possession of land devises it to several in succession. In such a case as the last the person in possession at the expiration of the twelve years cannot claim absolutely, but only holds under the will, the validity of which he is estopped from disputing as against those in remainder: *Anstee* v. *Nelms*, 1 H. & N. 225; *Yem* v. *Edwards*, 1 De G. & J. 598; *Hawksbee* v. *Hawksbee*, 11 Hare, 230; *Board* v. *Board*, L. R. 9 Q. B. 48. See, however, *Paine* v. *Jones* (L. R. 18 Eq. 320), where a person who took possession in accordance with the terms of a will which was ineffectual was held to have acquired title by adverse possession as against all the world.

Possession by coparcener.

The possession of one of several coparceners, joint tenants, or tenants in common, is not the possession of the others, and those who have been in possession will consequently become entitled to the shares of those who have not. See 3 & 4 Will. IV. c. 27, s. 12; *Burroughs* v. *McCreight*, 1 J. & Lat. 290; *Ward* v. *Ward*, L. R. 6 Ch. 789; *Bolling* v. *Hobday*, 31 W. R. 9.

Possession by agent.

The possession of a solicitor, or agent, is the possession of the principal: *Ward* v. *Cartter*, L. R. 1 Eq. 29; *Williams* v. *Pott*, L. R. 12 Eq. 149.

Copyholds.

In the case of copyholds where the lord has seized and held for twelve years, the right of the copyholder or his heir is barred: *Walters* v. *Webb*, L. R. 5 Ch. 531. So the lord's right of entry for forfeiture is barred after twelve years: *Doe* v. *Hellier*, 3 T. R. 162; *Whitton* v. *Peacock*, 3 Myl. & K. 325; 2 Bing. N. C. 411; *Turner* v. *West Bromwich Union*, 9 W. R. 155. But *quære* whether in spite of the interpretation clause in 3 & 4 Will. IV. c. 27, the Acts apply to heriots: *Lord Zouche* v. *Dalbiac*, L. R. 10 Ex. 172.

Tenant holding over.

A tenant at will holding for more than twelve years without acknowledging the right of the owner, and without interruption, acquires an indefeasible title against such owner: *Day* v. *Day*, L. R. 3 P. C. 751; *Mayor of Brighton* v. *Guardians of Brighton*, 5 C. P. D. 368.

Disabilities.

By the second and third sections, six years only is allowed, after the expiration of the twelve years, from the time a person first comes into possession or ceases to be incapacitated by infancy, coverture, or lunacy, from asserting his rights. No time is allowed for absence beyond the seas: sect. 4. And thirty years is the utmost allowance for disabilities: sect. 5.

Base fee.

Where a tenant in tail conveys without a deed enrolled, or without the consent of the protector, so as to create a base fee, the remainderman will be barred at the end of twelve years: sect. 6. See *Penny* v. *Allen*, 7 De G. M. & G. 409; *Morgan* v. *Morgan*, L. R. 10 Eq. 99; *Mills* v. *Capel*, L. R. 20 Eq. 692.

Possession by mortgagee.

If a mortgagee enters into possession, the mortgagor will be barred at the end of twelve years from the time when the mortgagee took possession, or from the last written acknowledgment, sect. 7.

It makes no difference if the mortgage is in the form of a trust for sale: *Locking* v. *Parker*, L. R. 8 Ch. 30; *Re Alison*, 11 Ch. D. 284. The period of twelve years limited by this section will not be extended, although the mortgagor has been under disability: *Kinsman* v. *Rouse*, 17 Ch. D. 104; *Forster* v. *Patterson*, *Ibid.* 132.

Sale by mtgee in person

The mtgee is absolute person under Statute of Limitations can sell under power of sale in mtge Re Alison mtge

Possession by the mortgagor of part of the mortgaged land will not prevent his right to the rest, of which the mortgagee has entered into possession, from being barred: *Kinsman* v. *Rouse*, 17 Ch. D. 104.

Acknowledgment of mortgagor's right.

The acknowledgment of the mortgagor's right must be communicated to him, a mere recital in a deed of conveyance by the mortgagee to a third person is not sufficient: *Lucas* v. *Dennison*, 13 Sim. 584.

A mere informal acknowledgment of the right to redeem is sufficient, if in writing: *Stansfield* v. *Hobson*, 3 De G. M. & G. 620.

Where there are several mortgagees, an acknowledgment by one is only effectual as against that one, see sect. 28 of 3 & 4 Will. IV. c. 27. But, where the mortgage is expressly made to several mortgagees on a joint account, an acknowledgment by one has no effect whatever: *Richardson* v. *Younge*, L. R. 6 Ch. 478.

Mortgagor in possession and not paying interest.

A mortgagee may bring an action to recover the mortgaged land at any time within twelve years after the last payment of principal or interest (7 Will. IV. & 1 Vict. c. 28, and 37 & 38 Vict. c. 57, s. 9), or any time within twelve years after he has obtained a decree of foreclosure: *Pugh* v. *Heath*, 7 App. Cas. 235.

Payment of interest.

The payment, in order to bind the mortgagor, must be made by himself, or by some person bound to pay principal or interest on his behalf. Payment of rent to the mortgagee by a tenant is not of itself such a payment: *Harlock* v. *Ashberry*, 19 Ch. D. 539; where Jessel, M. R., says, p. 545, "the underlying principle of all the Statutes of Limitation is, that a payment, to take a case out of the statute, must be a payment by a person liable, as an acknowledgment of right." See also *Pears* v. *Laing*, L. R. 12 Eq. 41; *Markwick* v. *Hardingham*, 15 Ch. D. 339.

Remedy on covenant in mortgage also barred.

Money secured by mortgage or otherwise, charged upon land, is to be deemed satisfied at the end of twelve years, if no interest has been paid or acknowledgment given in writing, sect. 8.

Under this section, the personal remedy on the covenant in a mortgage deed is lost by lapse of time, equally with the remedy

against the land: *Sutton* v. *Sutton*, 22 Ch. D. 511. And this applies to a collateral bond: *Fearnside* v. *Flint*, *Ibid.* 579.

Legal estate outstanding in satisfied mortgagee.

When the mortgage has been paid off, but no re-conveyance has been taken, the mortgagor becomes tenant at will to the mortgagee from the date of such payment, and the legal estate of the mortgagee is extinguished by more than twelve years' adverse possession of the mortgagor: *Sands to Thompson*, 22 Ch. D. 614.

Sect. 2.—*Arrears of Rent and Interest.*

Six years.

Arrears of rent or interest cannot be recovered beyond six years; see 3 & 4 Will. IV. c. 27, s. 42. As to arrears of rent, see *Bunting* v. *Sargent*, 13 Ch. D. 330. As to arrears of interest, see *Smith* v. *Hill*, 9 Ch. D. 143.

Interest on a mortgage.

With regard to arrears of interest on a mortgage, the following rules apply:—If a mortgagee has the proceeds of sale of the mortgaged property in his own hands, the legal right of retainer attaches, and he may repay himself the principal together with arrears of interest for any number of years: per V.-C. Malins, *Re Stead's Mortgaged Estates*, 2 Ch. D. 713, 717.

And the money is not considered to have left his possession if it is paid into Court in an action for the administration of the mortgagee's estate: *Edmunds* v. *Waugh*, L. R. 1 Eq. 418.

But if the mortgagee brings an action for foreclosure (*Shaw* v. *Johnson*, 1 Dr. & Sm. 412), or has in any way to seek the assistance of the Court, as by petitioning where the money has been paid into Court under the Lands Clauses Act (*Re Stead's Mortgaged Estates*, 2 Ch. D. 713), or the Trustee Relief Act (*Re Slater's Trusts*, 11 Ch. D. 227), he is only entitled to six years' arrears of interest. See also *Hunter* v. *Nockolds*, 1 Mac. & G. 640; *Sinclair* v. *Jackson*, 17 Beav. 405.

Where it is the mortgagor who seeks the assistance of the Court, in an action either to redeem or to recover the surplus proceeds of sale, the mortgagee will be entitled to all arrears of interest: *Edmunds* v. *Waugh*, L. R. 1 Eq. 418, not following *Mason* v. *Broadbent*, 33 Beav. 296; and see *Elvy* v. *Norwood*, 5 De G. & Sm. 240; *Sinclair* v. *Jackson*, 17 Beav. 405, 413.

SECT. 3.—*Express Trust and Fraud.*

Express trust.

No action can be brought to recover any money or legacy charged upon or payable out of any land or rent, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, except within the time within which the same would be recoverable if there were not any such trust, see 37 & 38 Vict. c. 57, s. 10. This section does not, it seems, bar the right to the annuity, but only the right to recover each instalment as it accrued due, see *Hughes* v. *Coles*, 27 Ch. D. 231.

With this enactment must be read that contained in the Judicature Act, 1873, s. 25, sub-s. 2: "No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations;" and see 3 & 4 Will. IV. c. 27, s. 25; *Knight* v. *Bowyer*, 2 De G. & J. 421; *Banner* v. *Berridge*, 18 Ch. D. 254.

Concealed fraud.

In cases of concealed fraud, time does not commence to run until the person dispossessed has discovered, or might with reasonable diligence have discovered the fraud: 3 & 4 Will. IV. c. 27, s. 26. This section will not apply unless there is fraud.

Underground cellars.

Thus, where adverse possession had been taken of an underground cellar, time was not prevented from running, because the owner was ignorant of such occupation: *Rains* v. *Buxton*, 14 Ch. D. 537.

Mines.

But an adjoining owner who, while working his own coal, goes on working the vein under his neighbour's land, acquires no title to it: *Ashton* v. *Stock*, 6 Ch. D. 719.

Bonâ fide purchaser.

The 26th section is declared to have no application as against a *bonâ fide* purchaser for value without knowledge of the fraud, see *Vane* v. *Vane*, L. R. 8 Ch. 383.

CHAPTER X.

TITLE UNDER THE PRESCRIPTION ACT.

SECT.		PAGE
1.	*Rights of common and profits à prendre*	207
	i. *Adverse possession*	208
	ii. *Custom*	209
2.	*Rights of way and other easements*	210
	i. *Highways and private ways*	210
	ii. *Watercourses*	211
	iii. *Right to support*	214
3.	*Right to light*	215
	i. *Ancient lights*	215
	ii. *Interruption*	216
	iii. *Enjoyment by agreement*	216
	iv. *Amount of light*	216

SECT. 1.—*Rights of Common and Profits à prendre.*

UNDER the Prescription Act, 2 & 3 Will. IV. c. 71, enjoyment for the prescribed number of years of commons and other profits *à prendre*, of ways and other easements, and of light, gives an absolute title to the person who has so enjoyed them. No user short of the time prescribed will avail: sect. 6. Infants and reversioners have a further period given to them within which to dispute or resist a claim, provided the right has not become absolute under the Act. See sects. 7, 8. 3 & 4 Will. 4, c. 71.

It is to be observed that the Act does not take away any of the modes of claiming easements which existed before its passing; it is still therefore open to any one to establish his title by proof of enjoyment from time immemorial independently of the statute: *Aynsley* v. *Glover*, L. R. 10 Ch. 283.

When, however, it is sought to establish the right under the statute, there must have been actual enjoyment of the right claimed during the first and the last years of the necessary period: *Parker* v. *Mitchell*, 11 A. & E. 788; *Hollins* v. *Verney*, 13 Q. B. D. 304.

A distinction is established by the Act between rights of common and profits *à prendre*, rights of way and other easements, dealt Distinction between rights

Chap. X. s. 1.

of common, &c., and right to light.

with by the first and second sections, and the right to light, dealt with by the third section. In the case of claims to right of common and other profits *à prendre*, these cannot, where such right or profit has been actually enjoyed by any person claiming right thereto without interruption for thirty years, be defeated or destroyed by showing only that such right or profit was first enjoyed at any time prior to such period of thirty years, but such claim may be defeated in any other way by which it might be defeated before the passing of the Act; and when such right or profit shall have been so enjoyed for sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement in writing, see sect. 1. A like provision is made by sect. 2 for the case of rights of way and other easements, except that the periods of enjoyment are fixed at twenty and forty years. In the case of claims to light, on the other hand, twenty years' uninterrupted enjoyment confers an absolute and indefeasible right, unless it appears that the same was enjoyed by consent or agreement in writing, see sect. 3.

In order, therefore, to establish a claim to any right of common, right of way, or other right falling within either of the first two sections, it is necessary to show that the enjoyment has been as of right. "Therefore, if the way shall appear to have been enjoyed by the claimant not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right.' For the same reason, it would not, if there had been unity of possession during all or part of the time, for then the claimant would not have enjoyed 'as of right' the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription or grant, would now be defeasible; and therefore, it may be answered by proof of a grant or of a licence written or parol for a limited period comprising the whole or

part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim and their agents during the whole time that it was exercised:" per Parke, B., *Bright* v. *Walker*, 1 Cr. M. & R. 211, 219; and see *Mason* v. *Shrewsbury Ry. Co.*, L. R. 6 Q. B. 578, 583.

The enjoyment of light need not have been as of right or adverse: *Mayor of London* v. *Pewterers Co.*, 2 Moo. & R. 409.

Rights of common and profits *à prendre*.

The first section applies only to rights of common and profits *à prendre*, that is, the right to take something out of the soil. A right to water cattle is not a profit *à prendre*, but an easement: see *Manning* v. *Wasdale*, 5 A. & E. 758.

Profits *à prendre* must be reasonable.

A profit *à prendre* must be reasonable and certain: *Att.-Gen.* v. *Mathias*, 4 K. & J. 579. A claim, therefore, to carry away an unlimited quantity of clay or sand is bad: *Blewett* v. *Tregonning*, 3 A. & E. 554; *Clayton* v. *Corby*, 5 Q. B. 415.

In like manner the claim of a copyholder to common appurtenant must be limited to some ascertainable number of cattle: *Morley* v. *Clifford*, 20 Ch. D. 753.

Custom.

A profit *à prendre* cannot be claimed by custom: *Att.-Gen.* v. *Mathias*, 4 K. & J. 579; and see *Austin* v. *Amhurst*, 7 Ch. D. 689; *Chilton* v. *Corporation of London*, *ibid.* 735; *Lord Rivers* v. *Adams*, 3 Ex. D. 361; *Earl de la Warr* v. *Miles*, 17 Ch. D. 535. But "where long continued user is proved of a beneficial enjoyment of rights of this kind, the tribunal ought not to be astute to destroy those valuable rights on any technical notion that a legal origin could not be attributed to them. It is the duty of the judges, as far as it is possible to do so, to attribute a legal origin to the actual exercise of those rights:" per Jessel, M. R., *Baylis* v. *Tyssen-Amhurst*, 6 Ch. D. 500, 510; and see *Johnson* v. *Barnes*, L. R. 8 C. P. 527.

No right arises from any user short of the prescribed period: *Bailey* v. *Appleyard*, 8 A. & E. 161.

Re-grant of common after enfranchisement.

Where copyhold lands are enfranchised the right of common is thereby extinguished. It is necessary, therefore, that such right should be regranted by the deed of enfranchisement, if it is intended that it should remain to the freeholder: see Scriven, Cop. 6th ed. p. 283; *Hall* v. *Byron*, 4 Ch. D. 667.

Chap. X. s. 2.

SECT. 2.—*Rights of Way, Watercourses and other Easements.*

Sect. 2. The second section applies to rights of way and other easements, such as a watercourse or use of water.

Highway. The right to use land as a highway may be gained by user by the public for a few years. "If a man opens his land so that the public pass over it continually, the public after a user of a very few years would be entitled to pass over it and use it as a way; and if the party does not mean to dedicate it as a way, but only to give a licence, he should do some act to show that he gives a licence only. The common course is to shut it up one day in every year, which I believe is the case at Lincoln's Inn:" per Patteson, J., *Trustees of British Museum* v. *Finnis*, 5 Car. & P. 460, 465; *Trustees of Rugby Charity* v. *Merryweather*, 11 East, 375, n. The owner must be aware of the user, so that if it has been over land in the occupation of a tenant, the landlord will not be bound unless it can be presumed from user for a great length of time that he was aware of it: *Davies* v. *Stephens*, 7 Car. & P. 570.

Private way. A right to a private way may be established by twenty years' user provided such user was adverse: *Campbell* v. *Wilson*, 3 East, 294.

Way for special purposes. User of a way for certain purposes does not entitle the person claiming it to use it for purposes which would impose a greater burden on the servient tenement; thus a road, which has been used only for agricultural purposes, cannot be used for carting building materials: *Wimbledon Conservators* v. *Dixon*, 1 Ch. D. 362; and see *Newcomen* v. *Coulson*, 5 Ch. D. 133; *Finch* v. *G. W. Ry. Co.*, 5 Ex. D. 254.

User must be continuous. The user must be uninterrupted, so that a claim to use a way occasionally at intervals of several years for the purpose of cutting wood cannot be sustained as being within the second section: *Hollins* v. *Verney*, 13 Q. B. D. 304; and see *Beeston* v. *Weate*, 5 E. & B. 986. A gate across the road is no conclusive evidence that there is no right of way: *Davies* v. *Stephens*, 7 Car. & P. 570.

Interruption and abandonment. An interruption in order to bar a right of way must have been submitted to or acquiesced in for a year: see sect. 4.

Thus, the right is not lost by mere non-user even for upwards of twenty years: *Ward* v. *Ward*, 7 Exch. 838. In this case during the time the way was not used, a more convenient way existed. "The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind. The case of *Reg.* v. *Chorley* (12 Q. B. 515), shows that time is not a necessary element in a question of abandonment as it is in the case of the acquisition of a right. Lord Denman, in delivering the judgment of the Court in that case, said: 'We apprehend that an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time.' And again: 'It is not so much the duration of the cesser, as the nature of the act done by the grantee of the easement, and the intention in him which it indicates, which are material for the consideration of the jury.' It is, therefore, a question of fact, whether the acts of the parties were of so unequivocal a nature as clearly to denote an intention to relinquish the right:" per Lord Chelmsford, L. C., *Crossley* v. *Lightowler*, L. R. 2 Ch. 478, 482; and see *Cook* v. *Mayor of Bath*, L. R. 6 Eq. 177.

Watercourses.

With regard to watercourses the law is thus laid down by Sir John Leach, V. C.: "Every proprietor has an equal right to use the water which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years; which term of twenty years is now adopted, upon a principle of general convenience,

Chap. X. s. 2.

as affording conclusive presumption of a grant. It appears to me that no action will lie for diverting or throwing back water, except by a person who sustains an actual injury; but the action must lie at any time within twenty years when the injury happens to arise, in consequence of a new purpose of the party to avail himself of his common right:" *Wright* v. *Howard*, 1 Sim. & St. 190, 203.

Natural rights of riparian owner.

Every riparian proprietor has a right to all the enjoyment he can derive from his interest in the stream provided he exercises that enjoyment in a reasonable manner. He may abstract a reasonable amount for his own purposes: *Sandwich* v. *Great Northern Ry. Co.*, 10 Ch. D. 707; and see *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; *Att.-Gen.* v. *Great Eastern Ry. Co.*, L. R. 6 Ch. 572; *Swindon Waterworks Co.* v. *Wilts, &c. Co.*, L. R. 7 H. L. 697. He can give a licence to a person who is not a riparian owner to abstract water, provided the water is afterwards returned before the stream leaves his land undiminished and unpolluted: *Kensit* v. *Great Eastern Ry. Co.*, 27 Ch. D. 122. For such user must not sensibly affect the flow of the water by the lands of other riparian proprietors: *Ormerod* v. *Todmorden Co.*, 11 Q. B. D. 155. The non-riparian owner to whom such licence is given may prevent any obstruction to his enjoyment of the water caused by a higher riparian owner: *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1.

Acquired rights of riparian owner.

In addition to the above-mentioned rights, which every riparian proprietor has in the stream flowing by or through his land, he may, by continued enjoyment, acquire other rights under section 2 of the Prescription Act. Thus he may acquire the right to abstract or divert large quantities of water so as to diminish the flow lower down: *Mason* v. *Shrewsbury Ry. Co.*, L. R. 6 Q. B. 578; he may acquire the right to throw back water on to the lands above by means of a dam or weir: *Wright* v. *Howard*, 1 Sim. & St. 190, 203; or he may acquire the right to pollute the water: *Crossley* v. *Lightowler*, L. R. 2 Ch. 478.

Such rights, however, cannot be established by proof of less than twenty years' user: *Prescott* v. *Phillips*, cited 6 East, 213; *Ward* v. *Robins*, 15 M. & W. 237; and see *Mason* v. *Hill*, 5 B.

& Ad. 1; *Goldsmid* v. *Tunbridge Wells Commissioners*, L. R. 1 Ch. 349; and the enjoyment must be as of right and adverse: *Bright* v. *Walker*, 1 C. M. & R. 211; and see *Cooper* v. *Barber*, 3 Taunt. 99. The right, too, may be lost by interruption for one year (see sect. 4), or by abandonment: see *Crossley* v. *Lightowler*, L. R. 2 Ch. 478, 482.

Where water has been continuously abstracted, so as to prevent the stream from overflowing, for more than forty years, a riparian owner lower down the stream does not acquire any right to have the abstraction continued so as to prevent floods in the future: *Mason* v. *Shrewsbury Ry. Co.*, L. R. 6 Q. B. 578.

Subterraneous water.

The law with respect to water not flowing along a natural channel, but by subterraneous courses, is somewhat different.

The owner of the soil through which it thus percolates has no right to prevent it from being drawn off by operations of a neighbouring landowner, as by mining: *Acton* v. *Blundell*, 12 M. & W. 324; *Chasemore* v. *Richards*, 7 H. L. C. 349. But such operations will be restrained if they draw off water flowing in a defined surface channel: *Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. 483.

Although water flowing through natural underground passages may be abstracted, it may not be polluted and then suffered to pass on into a neighbour's well: *Ballard* v. *Tomlinson*, W. N. 1885, 36; and see *Turner* v. *Mirfield*, 34 Beav. 390; *Snow* v. *Whitehead*, 27 Ch. D. 588. Sutton and Ash v Cund. W.N. 86 p. 120. 29 Ch.D. 116

Artificial watercourses.

The right to use the water of an artificial stream may be acquired by user, and the owner of the land where it commences may be restrained from diverting it, if it appears that it was originally made for the benefit of the persons using it or their predecessors: *Ivimey* v. *Stocker*, L. R. 1 Ch. 396, and cases there cited. See also *Holker* v. *Porritt*, L. R. 10 Ex. 59; *Rameshur Singh* v. *Koonj Pattuk*, 4 App. Cas. 121. But the creator of an artificial watercourse cannot be compelled to continue it for the benefit of those who may have used it lower down: *Arkwright* v. *Gell*, 5 M. & W. 203; and see *Wood* v. *Waud*, 3 Exch. 748; *Greatrex* v. *Hayward*, 8 Exch. 291; *Staffordshire Canal Co.* v. *Birmingham Canal Co.*, L. R. 1 H. L. 254.

Right to discharge water

The right to pump water from a mine so as to cause it to

Chap. X. s. 2.

onto another's land.

flow through another man's land may be acquired: *Wright* v. *Williams*, 1 M. & W. 77; and see *West Cumberland Iron Co.* v. *Kenyon*, 11 Ch. D. 782.

So may the right to discharge water from the eaves of a house on to a neighbour's land: *Thomas* v. *Thomas*, 2 C. M. & R. 34. And the right continues after the house has been rebuilt: *Ibid.*

But the owner of the land on to which the water is discharged could not, even after twenty years, compel the continuance of the discharge, see *Arkwright* v. *Gell*, 5 M. & W. 203, 233.

An easement can be acquired to carry water across another man's land through an artificial course or through pipes, and such easement may prevent the owner of the land from building: *Beeston* v. *Weate*, 5 E. & B. 986; *Goodhart* v. *Hyett*, 25 Ch. D. 182.

Right to support for land;

The owner of land has a right to all the vertical and lateral support it may require in its natural condition: *Humphries* v. *Brogden*, 12 Q. B. 739; *Rowbotham* v. *Wilson*, 8 E. & B. 123; 8 H. L. C. 348.

for buildings.

If he erects a building upon it he will, after twenty years, acquire the right to such additional support, vertical and lateral, from the adjoining land as his land with the building may require; and the same applies where he has altered his building so as to make it heavier, and twenty years have elapsed from the time of the alteration: *Angus* v. *Dalton*, 6 App. Cas. 740, and cases there cited. Such a right is an easement within the Prescription Act, see judgment of Lord Selborne, L. C. See also *Bell* v. *Love*, 10 Q. B. D. 547.

The owner of a flat in a house has a right to have it supported by the floors below: *Caledonian Ry. Co.* v. *Sprot*, 2 Macq. 449; *Humphries* v. *Brogden*, 12 Q. B. 756; and when the owner of two adjoining houses sells one of them, the right to the necessary support from the other house is retained or granted by implication: *Richards* v. *Rose*, 9 Exch. 218. So on a sale of land for building, the right to support from the adjoining land sufficient for the soil with the building to be erected is held to pass: *Rigby* v. *Bennett*, 21 Ch. D. 559.

So after the lapse of twenty years a house which has been built up against another house acquires a right to the support:

Lemaitre v. *Davis*, 19 Ch. D. 281. But the enjoyment must be open (*ibid.*), and as of right: *Tone* v. *Preston*, 24 Ch. D. 739.

Right to have a signboard.

The right to have a signboard hanging from a neighbour's house has been recognized: *Moody* v. *Steggles*, 12 Ch. D. 261. So has the right to the support of fascia: *Francis* v. *Hayward*, 22 Ch. D. 177.

Sect. 3.—*Right to Light.*

Sect. 3.

Ancient lights.

The case of claims to light is dealt with by the third section.

The effect of this section as stated by Lord Westbury, L. C., in *Tapling* v. *Jones* (11 H. L. C. 290, 304), is to make the right to what is called an ancient light depend upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be rested on any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor. See also Scott v. Pape 31 Ch D. 554.

The owner of a house may open any window in it he pleases overlooking any adjoining owner. The adjoining owner cannot prevent this; all he can do is to build up on his own land so as to shut out the new window, see *Tapling* v. *Jones*, *ubi sup.* p. 305.

If the adjoining owner does not build up against the window, the owner of it will, after an enjoyment of access of light for twenty years without interruption, obtain an absolute and indefeasible right which cannot be lost or defeated by a subsequent temporary intermission of enjoyment not amounting to abandonment: *Tapling* v. *Jones*, *ubi sup.* p. 304.

If during any part of the twenty years the owner of the dominant tenement is also the owner of the servient, the running of time is for that period suspended: *Ladyman* v. *Grave*, L. R. 6 Ch. 763. Provided the two tenements are not in the hands of the same owner it makes no difference whether they are occupied by the owners themselves or by tenants: *Ibid.*

It is not necessary that the house should have been completely finished and inhabited during the whole of the twenty years, provided the window in question has been in existence for that time: *Courtauld* v. *Legh*, L. R. 4 Ex. 126.

Chap. X. s. 3.

User must be without interruption.

An interruption to the access of light, in order to prevent the right arising, must have been submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof, and of the person making the same, see sect. 4. Under this section it is not necessary that the owner of the window should take active measures to cause the obstruction to be removed; his protests and complaints are evidence of his not having acquiesced: *Glover* v. *Coleman*, L. R. 10 C. P. 108. In the case of *Seddon* v. *Bank of Bolton* (19 Ch. D. 462), Fry, J., seems to have considered that some special form of notice of the obstruction was necessary: see p. 469. However, the point did not call for actual decision, and it seems difficult to imagine a more effectual form of notice of interruption by an adjoining owner than a hoarding erected on his land blocking up the window.

A railway company may block up windows overlooking their yard, so as to prevent the right to light from being acquired: *Bonner* v. *G. W. Ry. Co.*, 24 Ch. D. 1.

Uninterrupted enjoyment under agreement in writing.

The only way by which the adjoining owner can prevent uninterrupted enjoyment of light from ripening into the absolute right to the enjoyment is by erecting a hoarding against the window, as in *Cooper* v. *Crabtree* (20 Ch. D. 589), unless the owner of the window agrees to join in a deed or writing showing that the enjoyment is only by consent or agreement, see *Bewley* v. *Atkinson*, 13 Ch. D. 283.

A mere verbal permission (*Mayor of London* v. *Pewterers' Co.*, 2 Moo. & R. 409), or payment of a rent for the use of lights (*Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Exch. 630), is not sufficient to prevent the statute from running.

Amount of light.

With regard to the amount of light to which the owner of an ancient window is entitled, there is nothing to limit it to the light which would come in at an angle of forty-five degrees: *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282. As a rule the owner of the window is entitled to a reasonable amount of light, having regard not only to the present but also to the possible future use of the property (*Yates* v. *Jack*, L. R. 1 Ch. 295; *Aynsley* v. *Glover*, L. R. 18 Eq. 544; 10 Ch. D. 283; *Moore* v. *Hall*, 3 Q. B. D. 178), in which cases the purposes for

which the windows were used did not require much light. In the latter of these cases (see 18 Eq. 548), Jessel, M. R., considered that *Jackson* v. *Duke of Newcastle* (3 De G. J. & S. 275) has been overruled.

On the other hand, where a business has been carried on for twenty years requiring an unusual amount of light, as in the case of a photographer or an artist, the owner of the window will acquire the right to the necessary amount of light, however large: *Theed* v. *Debenham*, 2 Ch. D. 165; *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282.

Town and country.

There is no distinction between the amount of light which can be claimed in town and in the country: *Dent* v. *Auction Mart Co.*, L. R. 2 Eq. 238. But it seems that the Court will more readily order an obstruction to be removed in the country than in town. See remarks of James, L. J., in *Kelk* v. *Pearson*, L. R. 6 Ch. 809, 812.

It is no answer to an action for obstructing ancient lights to say that, owing to alterations and other neighbouring buildings, the plaintiff has on the whole more light than he had before the obstruction complained of: *Dyers' Co.* v. *King*, L. R. 9 Eq. 438. The plaintiff must, however, prove substantial interference with his lights: *Kino* v. *Rudkin*, 6 Ch. D. 160.

Alterations in windows.

The right to light is not lost by opening out new windows (*Tapling* v. *Jones*, 11 H. L. Cas. 290), or by altering the windows, so long as the light which would have passed through the old windows passes also through the new: *National Provincial, &c. Co.* v. *Prudential Assurance Co.*, 6 Ch. D. 757; *Barnes* v. *Loach*, 4 Q. B. D. 494: but *quære* whether at least one of the new windows must not include the whole or the greater part of the area of one of the old windows in order to entitle the owner to an injunction: *Newson* v. *Pender*, 27 Ch. D. 43. Even if the house has been completely pulled down with a view to rebuilding, so that no windows at all are existing, the right is not lost unless it has been abandoned: *Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D. 213.

CHAPTER XI.

FRAUDULENT AND VOLUNTARY CONVEYANCES.

SECT.	PAGE
1. *Fraudulent conveyances under 13 Eliz. c. 5*	218
i. *Intention to defraud*	218
1. *Fraudulent, &c.*—cont.	
ii. *Conveyances by bankrupts*	220
2. *Voluntary conveyances under 27 Eliz. c. 4*	221

SECT. 1.—*Fraudulent Conveyances under* 13 *Eliz. c.* 5.

UNDER the Act of 13 Eliz. c. 5, s. 2, every conveyance of lands made with intent to hinder, delay or defraud creditors shall be deemed void, only, however, as against such creditors and persons claiming under them.

Sect. 6 provides that the Act shall not extend to conveyances for good consideration and *bonâ fide* made to persons not having notice of fraud.

The Act was made perpetual by 29 Eliz. c. 5.

Fraudulent intention.

The effect of this Act is to render the settlement void as against creditors in all cases where a fraudulent intention is proved. For this, it is sufficient to prove that the settlor was insolvent at the time of making the settlement, although his intention may have been rather to be generous to his relations than unjust to his creditors, see the judgments of Lord Hatherley, L. C., and Giffard, L. J., in *Freeman* v. *Pope*, L. R. 5 Ch. 538. Some of the dicta of Lord Westbury, L. C., in *Spirett* v. *Willows* (3 De G. J. & S. 293), are considered to have gone too far, though the case was rightly decided.

Embarrassed circumstances.

In the absence of fraudulent intent, a settlement by a person in embarrassed circumstances, but having at the time of the settlement other property sufficient to pay his debts then owing, may be supported: *Kent* v. *Riley*, L. R. 14 Eq. 190; and see *Skarf* v. *Soulby*, 1 Mac. & G. 364.

Intention to engage in trade.

If, however, the settlor is about to engage in trade at the time of making the settlement, the burden rests on him of showing his solvency at that time: *Mackay* v. *Douglas*, L. R. 14 Eq. 106; and see *Crossley* v. *Elworthy*, L. R. 12 Eq. 158. And, if it appears that his debts exceeded his assets, the settlement will be declared void: *Taylor* v. *Coenen*, 1 Ch. D. 636; *Re Ridler*, 22 Ch. D. 74; and see *Cornish* v. *Clark*, L. R. 14 Eq. 184; *Re Pearson*, 3 Ch. D. 807.

Settlement mere cloak for retaining benefit.

A deed which is a mere cloak for retaining a benefit to the grantor or his family will be void: *Ex parte Games*, 12 Ch. D. 314; and see *Twyne's Case*, 3 Rep. 80; Smith's L. C. I. 1; *French* v. *French*, 6 De G. M. & G. 95; *Ware* v. *Gardner*, L. R. 7 Eq. 317.

Settlement for valuable consideration.

If the deed is made for valuable consideration, it is not necessarily good (see *Re Maddever*, 27 Ch. D. 523), but the difficulty of impeaching it is greatly increased: *Holmes* v. *Penney*, 3 K. & J. 90; *Thompson* v. *Webster*, 4 De G. & J. 600; *Re Johnson*, 20 Ch. D. 389, 393. Thus, a settlement fraudulently made by an insolvent person, in contemplation of his marriage, may be supported against the creditors, at least so far as the interests of the wife and children are concerned: *Kevan* v. *Crawford*, 6 Ch. D. 29.

Settlement of leaseholds.

The fact that the property settled is leasehold does not import valuable consideration, the doctrine of *Price* v. *Jenkins* (5 Ch. D. 619), not being applicable to 13 Eliz. c. 5. See *Re Ridler*, 22 Ch. D. 74.

Creditors' deed.

An assignment for the benefit of creditors generally is not within the Act: *Janes* v. *Whitbread*, 11 C. B. 406; and see *Spencer* v. *Slater*, 4 Q. B. D. 13; *Boldero* v. *London and Westminster Discount Co.*, 5 Ex. D. 47.

At suit of subsequent creditor.

The settlement may be set aside at the suit of a subsequent creditor, but if all the debts existing at the date of the settlement have been paid, he must bring other evidence of fraudulent intention than the mere fact of the settlor being indebted at the date of the deed: *Jenkyn* v. *Vaughan*, 3 Drew. 419.

Delay on the part of the creditor.

The mere fact of a creditor delaying to take proceedings to have the deed set aside is no defence, until the right is actually barred (*Re Maddever*, 27 Ch. D. 523), where the creditor ab-

Chap. XI. s. 1.

stained from taking proceedings for nearly ten years without any satisfactory reason, and yet was held entitled to have the deed declared void.

Bankruptcy Act, 1883, s. 47.

By the Bankruptcy Act, 1883, sect. 47, it is enacted, that any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor become bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. See sect. 91 of the Bankruptcy Act, 1869; see also *Ex parte Bolland*, L. R. 17 Eq. 115; *Ex parte Huxtable*, 2 Ch. D. 54; *Re Andrews' Trust*, 7 Ch. D. 635; *Ex parte Russell*, 19 Ch. D. 588.

The section applies to settlements executed before as well as after the Act, see *Ex parte Dawson*, L. R. 19 Eq. 433.

The word "purchaser" means a buyer in the ordinary commercial sense, not a purchaser in the legal sense, and, therefore, does not include a trustee of leaseholds: *Ex parte Hillman*, 10 Ch. D. 622.

Under this section of the Bankruptcy Act the settlor must be able to pay his debts in the way in which he is proposing to pay them, *i. e.* in the ordinary course of his business, if he is proposing to continue it: *Ex parte Russell*, 19 Ch. D. 588.

Fraudulent preference of creditor.

Under the 48th section of the Bankruptcy Act, 1883, a conveyance to one creditor, which amounts to a fraudulent preference, if the grantor becomes bankrupt within three months, is void. See also *Smith* v. *Hurst*, 10 Hare, 30; *Butcher* v. *Stead*, L. R. 7 H. L. 839; *Tomkins* v. *Saffery*, 3 App. Cas. 213; *Ex*

parte Kelly, 11 Ch. D. 306; *Ex parte Symmons*, 14 Ch. D. 693; *Ex parte Stubbins*, 17 Ch. D. 58; *Ex parte Hall*, 19 Ch. D. 580; *Ex parte Griffith*, 23 Ch. D. 69; *Ex parte Hill*, *ibid.* 695; *Ex parte Chaplin*, 26 Ch. D. 319.

Sect. 2.—*Voluntary Settlements under 27 Eliz. c. 4.*

By the 27 Eliz. c. 4, s. 2, it is enacted that every conveyance of lands for the intent to defraud and deceive such persons as shall purchase the same for good consideration, shall be deemed void as against those persons, and persons claiming under them.

The fifth section extends the application of the Act to a conveyance with a power of revocation reserved to the grantor. The Act is made perpetual by 39 Eliz. c. 18, s. 32.

A mortgagee is a purchaser within the meaning of the statute: *Dolphin* v. *Aylward*, L. R. 4 H. L. 486.

Purchaser not affected by notice of settlement.

A purchaser for valuable consideration from the settlor is not affected, although he has notice of the voluntary settlement: *Buckle* v. *Mitchell*, 18 Ves. 100; and the purchase-money is payable to the settlor, not to the persons claiming under the settlement: *Daking* v. *Whimper*, 26 Beav. 568.

Purchaser can enforce specific performance.

The purchaser can enforce specific performance against the settlor: *Rosher* v. *Williams*, L. R. 20 Eq. 210; and the settlement being altogether void as against him, he can take a conveyance of the legal estate from the settlor, although it has been vested by the settlement in the trustees. And it seems that this is so even where the legal estate has never been in the settlor, but has been conveyed direct to the trustees of the settlement, on the occasion of the purchase by the settlor: see *Barton* v. *Vanheythuysen*, 11 Hare, 126.

The purchaser can also force a subsequent purchaser from him to accept a title so acquired: *Butterfield* v. *Heath*, 15 Beav. 408.

Settlor cannot enforce specific performance.

But the settlor cannot enforce specific performance against the purchaser, as the Court will give him no assistance in defeating his own settlement: *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 281; and the purchaser can in such case recover his deposit: *Clarke* v. *Willott*, L. R. 7 Ex. 313.

But this does not apply where the defendant says he is willing to complete on having a good title: *Peter* v. *Nicolls*, L. R. 11 Eq. 391.

Title unsatisfactory.

The title to property which is subject to a voluntary settlement cannot, however, be looked upon as altogether satisfactory, for the Court will lay hold of slight circumstances to enable it to support the settlement against the purchaser.

Settlement readily upheld by Court even against purchaser.

Leaseholds.

Thus a very inadequate money consideration has been held to prevent the settlement from being voluntary: *Bayspoole* v. *Collins*, L. R. 6 Ch. 228. So has the fact that the property settled was leasehold, in respect of which a liability attached to the trustees of the settlement: *Price* v. *Jenkins*, 5 Ch. D. 619. So has the concurrence of a necessary party: *Myddleton* v. *Lord Kenyon*, 2 Ves. jun. 391; or of a stranger taking a liability upon himself: *Ford* v. *Stuart*, 15 Beav. 493.

Again, if the settlement is by the husband and wife, and affects, no matter how slightly, their respective interests in the property, it is considered as being made on a contract between them, and as such not without valuable consideration. In such a case, even though post-nuptial, it will be upheld against a subsequent purchaser: *Teasdale* v. *Braithwaite*, 5 Ch. D. 630, following *Hewison* v. *Negus*, 16 Beav. 594; *Atkinson* v. *Smith*, 3 De G. & J. 186; *Re Foster and Lister*, 6 Ch. D. 87. See, however, *Shurmur* v. *Sedgwick* (24 Ch. D. 597), where it was held that the parties must give up some interest of appreciable value, in order that the settlement may be for valuable consideration, and that the mere possibility that the husband might become entitled to an estate by the curtesy was not an interest of any value.

Post-nuptial settlements and ante-nuptial agreements.

A post-nuptial settlement made in pursuance of an ante-nuptial agreement is of course not within the statute. In *Ferrars* v. *Cherry* (2 Vern. 383), it was held that a post-nuptial settlement was notice of an ante-nuptial agreement, and that the purchaser ought to have made inquiries. If he does make inquiries and receives a satisfactory answer, it seems that he will not be affected with notice, even though the answer given is untrue: *Jones* v. *Smith*, 1 Ph. 244, and see *post*, p. 319.

It is necessary that the ante-nuptial agreement should be

binding, in order to take the post-nuptial settlement out of the statute. Thus, a purchaser is not affected if the ante-nuptial agreement was made by an infant, and therefore not binding on him: *Trowell* v. *Shenton*, 8 Ch. D. 318. And see *Warden* v. *Jones*, 2 De G. & J. 76.

As to what persons are within the marriage consideration, and can enforce the settlement, see *Price* v. *Jenkins*, 4 Ch. D. 483, 5 Ch. D. 619; *Gale* v. *Gale*, 6 Ch. D. 144; *Re D'Angibau*, 15 Ch. D. 228; *Paul* v. *Paul*, 20 Ch. D. 742, and cases there cited.

Settlement supported by extrinsic evidence of consideration.

The Court will, even as against creditors, allow extrinsic evidence to be adduced to prove that a settlement in form voluntary was made for valuable consideration: *Pott* v. *Todhunter*, 2 Coll. 76. But *quære* as against a purchaser, see *Kelson* v. *Kelson*, 10 Hare, 385; *Townend* v. *Toker*, L. R. 1 Ch. 446; in both of which cases the consideration for the settlement was partly mentioned in the deed and partly supplied by extrinsic evidence.

Sales by beneficiaries under the settlement.

A voluntary settlement may also be supported by matter *ex post facto*, as where the volunteers have afterwards made bargains in respect of their interests under the settlement: see *Johnson* v. *Legard*, T. & R. 281, 294. Thus they may have settled them on marriage: *Brown* v. *Carter*, 5 Ves. 862, 876; *Tanner* v. *Byne*, 1 Sim. 160; *Roddy* v. *Williams*, 3 J. & Lat. 1; or have charged or sold their interests: *George* v. *Milbanke*, 9 Ves. 190; *Payne* v. *Mortimer*, 4 De G. & J. 447. In such cases the purchaser from the volunteer will be preferred to a subsequent purchaser from the settlor, see Sugd. V. & P. 720; unless the settlement was obtained by fraud, of which the purchaser under it had notice: *Parker* v. *Clarke*, 30 Beav. 54.

Deed in favour of creditor, but not communicated.

A deed which purports to secure a debt, if retained by the debtor and not communicated in any way to the creditor, may be void as against a subsequent purchaser: *Cracknall* v. *Janson*, 11 Ch. D. 1, explaining *Exton* v. *Scott*, 6 Sim. 31. And see *Smith* v. *Hurst*, 10 Hare, 30.

Power of revocation.

A deed containing a power of revocation (see sect. 5 of the Act), can be revoked, even though made for valuable consideration: Sugd. V. & P. 721. As to the duty of a solicitor to see

that such a power is inserted in a proper case, see *Coutts* v. *Acworth*, L. R. 8 Eq. 558; *Phillips* v. *Mullings*, L. R. 7 Ch. 244.

Voluntary conveyance to a charity.

A voluntary conveyance to a charity has been held not to be within the Act, so as to be defeated by a subsequent conveyance by the grantor: *Att.-Gen.* v. *Corporation of Newcastle*, 12 Cl. & Fin. 402. In this case, however, the grantors, a municipal corporation, never had the estate, but caused it to be conveyed direct to the trustees for the charity, and it is therefore considered that the point is not finally settled: see Sugd. V. & P. 719; *Trye* v. *Corporation of Gloucester*, 14 Beav. 173. But in *Barton* v. *Vanheythuysen* (11 Hare, 126), it was held that the mere fact that the conveyance was taken direct to the trustees of the settlement made no difference in the case of a voluntary family settlement, and it is therefore conceived that it would make no difference if the estate were conveyed direct by the grantor to the trustees of the charity, and that such grant could consequently not be defeated by a subsequent conveyance.

CHAPTER XII.

COVENANTS RELATING TO THE LAND.

SECT.		PAGE
1.	*Covenants in leases*	225
2.	*Covenants between vendor and purchaser*	226
i.	*Benefit of covenants*	226
ii.	*Burden of covenants*	228
3.	*Restrictive covenants of which purchaser has notice*	229
i.	*Notice*	229
ii.	*Mutual covenants on sale of building land*	231
iii.	*Acquiescence in breaches*	232

SECT. 1.—*Covenants in Leases.*

Covenants which relate to the thing demised.

WHERE the covenants in a lease relate to the thing demised, the benefit of the lessor's covenants runs with the land so that the assignee of the lease can sue upon them; the burden of the lessor's covenants runs with the reversion so that the assignee of the reversion can be sued upon them; so also the benefit of the lessee's covenants runs with the reversion, and the burden of his covenants runs with the land. See 32 Hen. 8, c. 34; *Spencer's case*, cited Smith's L. C. Vol. I.; *Isherwood* v. *Oldknow*, 3 M. & S. 382; see also Third Report of the Real Property Commissioners printed in Dav. Conv. Vol. I. 122.

Among covenants which relate to the thing demised are covenants for title: see Sug. V. & P. 577; a covenant to renew: see *Roe* v. *Hayley*, 12 East, 464, 469; *Worley* v. *Frampton*, 5 Hare, 560; or a stipulation for shortening the term: *Roe* v. *Hayley*, *supra*; a covenant to keep in repair an existing building: *Williams* v. *Earle*, L. R. 3 Q. B. 739; a covenant not to assign or underlet: *Ibid.*; a covenant not to carry on a particular trade: *Clements* v. *Welles*, L. R. 1 Eq. 200; a covenant not to plough the lands: *Cockson* v. *Cock*, Cro. Jac. 125; a covenant

Ch. XII. s. 1.

to leave the land well stocked with game: *Hooper* v. *Clark*, L. R. 2 Q. B. 200.

Covenants which concern something not yet *in esse*.

Covenants which require the lessee to place something new on the land demised, as to build a wall, bind, it seems, the assignees only where they are expressly mentioned: *Spencer's case*, *ubi supra*; *Doughty* v. *Bowman*, 11 Q. B. 444. In *Easterby* v. *Sampson* (6 Bing. 644), the assigns were mentioned, but in *Minshull* v. *Oakes* (2 H. & N. 793), a covenant to keep in repair a building which was to be erected was held to bind the assignees, though not named. Such covenants can be enforced by the assignee of the covenantee: *Easterby* v. *Sampson*, 6 Bing. 644.

Covenants which do not relate to the thing demised.

Covenants which do not relate to the thing demised do not run with the land: *Spencer's case*, *ubi supra*. Thus covenants to build a house on other land (*ibid.*); not to trade within a certain distance of the demised premises (*Thomas* v. *Hayward*, L. R. 4 Ex. 311), will not bind the assignees of the land, or the reversion, nor can they sue upon them, although they are expressly mentioned in the covenant.

Sect. 2.—*Covenants between Vendor and Purchaser.*

Benefit of covenants runs with the land.

The benefit of covenants relating to land entered into between vendor and purchaser runs with the land.

Thus the assignee of the land of the covenantee can sue upon covenants for title: see Sug. V. & P. p. 577; covenants for the production of deeds: *Barclay* v. *Raine*, 1 Sim. & St. 449; covenants not to use adjoining land for objectionable purposes: *Nicoll* v. *Fenning*, 19 Ch. D. 258; covenants not to build: *Child* v. *Douglas*, 5 De G. M. & G. 739; nor does it make any difference if the assignee had no notice of the covenants at the time of purchasing: *Ibid.*

Assignee

The assignee of the land in order to sue on the covenant must

must be in of same estate.

be in of the same estate as the original covenantee. See *Roach* v. *Wadham*, 6 East, 289; *Child* v. *Douglas*, Kay, 560, 569; 5 De G. M. & G. 739.

The lessee of a purchaser is entitled to the benefit of a covenant as an assign: *Taite* v. *Gosling*, 11 Ch. D. 273.

Assignee of rent.

Where land has been granted in fee in consideration of a rent-charge, and a covenant to build and repair buildings, the covenant does not run with the rent in the hands of an assignee: *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; and see Sug. V. & P. 14th ed. p. 590.

A remainderman entitled after a tenant for life will not be entitled to enforce a covenant entered into with a previous owner of the land, where the damage to his reversion is inappreciable: *Johnstone* v. *Hall*, 2 K. & J. 414.

Assignee of particular land.

This rule that the benefit of covenants runs with the land only applies in favour of the assignee of the particular land for the benefit of which the covenant appears from the deed itself to have been entered into. Thus where the conveyance contained a covenant by the purchaser with the vendor and his assigns as to building, but there was nothing to show that the vendors were owners of the adjoining land, or that the covenant was intended to be for the benefit of the adjoining land, subsequent purchasers from the vendors were held unable to enforce the covenant: *Renals* v. *Cowlishaw*, 11 Ch. D. 866.

Assignee of part of land.

Nor does the rule necessarily apply to the case of a purchaser of part only of the land for the benefit of which the covenant has been entered into, even though he has himself entered into an identical covenant. The question is whether the covenants were entered into for the benefit of the several purchasers mutually, or for the sole benefit of the owner of the estate that he might be able to make the most of it. If the latter is the case, each purchaser is only liable to the vendor and persons to whom he has assigned the benefit of the covenant. As against the other purchasers the vendor can release the covenant: *Schreiber* v. *Creed*, 10 Sim. 9; *Keates* v. *Lyon*, L. R. 4 Ch. 218; *Master* v. *Hansard*, 4 Ch. D. 718. See, however, *Baskcomb* v. *Beckwith* (L. R. 8 Eq. 100), where it was held by Lord Romilly, M. R., that where a vendor had put up the whole of

Ch. XII. s. 2.

his property, with the exception of a small piece, for sale in building lots, and required the purchasers to covenant not to set up a public house on their separate lots, he could not insist upon specific performance except on condition of himself entering into a similar covenant in respect of the piece of land retained.

Where, however, the estate has been sold in lots with mutual covenants for the benefit of the several purchasers, each purchaser can insist upon the performance of the covenants as against the other: see cases cited *post*, p. 231.

Burden of covenants.

Whether the burden of covenants relating to land runs with the land so as to bind the assignee is not very clearly settled. The balance of authority seems to be in favour of the view that it does not. It is true that in *Cooke* v. *Chilcott* (3 Ch. D. 694), it was held by Malins, V.-C., that the burden of a covenant to erect a pump, and supply water to houses on other land, ran with the land on which the pump was to be erected. This decision has, however, been questioned, and in the case of *Haywood* v. *Brunswick Building Society* (8 Q. B. D. 403, 408), Brett, M. R., said, "I think there is much to show that the ground of the decision was that Malins, V.-C., was of opinion—wrongly as it now turns out—that the covenant ran with the land." And in the same case Cotton, L. J., said, p. 408, "I think that a mere covenant that land shall be improved does not run with the land within the rule in *Spencer's case*." See also *Keppell* v. *Bailey*, 2 Myl. & K. 517, 535; *McLean* v. *McKay*, L. R. 5 P. C. 327; *Andrew* v. *Aitken*, 22 Ch. D. 218. In *Morland* v. *Cook* (L. R. 6 Eq. 252), a covenant to contribute towards the repair of sea walls necessary for the protection of land below the level of the sea was held binding on the purchaser of part of the land. But here there were special circumstances arising from the very necessity of the case. In *Re Monckton and Gilzean* (27 Ch. D. 555, 562), Bacon, V.-C., alludes to restrictive covenants running with the land, so that whoever has the land is bound by the restrictions. On the other hand, in the case of *Leech* v. *Schweder* (L. R. 9 Ch. 463, 475), Mellish, L. J., stated the law to be as follows: "Where the right comes into existence by covenant, the burden does not

run at law with the servient tenement at all; but a Court of Equity says that a person who takes it with notice that such a covenant has been made, shall be compelled to observe it . . . . In such a case as that, though the man who makes the covenant is liable, yet those claiming under him are not liable at law; but the Court of Equity says that if a purchaser has taken the land with notice of that contract, it is contrary to equity that he should take advantage of that rule of law to violate the covenant."

In *Rowbotham* v. *Wilson* (8 H. L. C. 348), on a question as to the right to work minerals, it was laid down at p. 362, that if the words could only be read as amounting to a covenant, such a covenant would not affect the land in the hands of the assignee of the covenantor; but that if they amounted to a grant of an easement, the grant would bind the subsequent owners of the servient tenement.

The better opinion, therefore, seems to be that if the owner of land enters into a covenant restricting the use of that land, and afterwards sells it, the purchaser is not bound by the covenant, unless he had notice of it. This subject is treated in the next section.

Sect. 3.—*Restrictive Covenants of which the Purchaser has Notice.*

Notice of restrictive covenant.

Where a person buys land with notice of a covenant entered into by the vendor restricting the user of the land, he is bound by the covenant independently of the question whether it runs with the land or not: see *Tulk* v. *Moxhay*, 2 Ph. 774, where Lord Cottenham, L. C., stated the question to be, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased.

This principle is fully recognized and acted on: see *Mann* v. *Stephens*, 15 Sim. 377; *Patching* v. *Dubbins*, Kay, 1; affirmed 23 L. J. Ch. 45; *Coles* v. *Sims*, 5 De G. M. & G. 1; *Bowes* v.

Ch. XII. s. 3.

Law, L. R. 9 Eq. 636; *Lord Manners* v. *Johnson*, 1 Ch. D. 673; *Richards* v. *Revitt*, 7 Ch. D. 224.

In *Luker* v. *Dennis* (7 Ch. D. 227), a covenant by a lessee of one public house to buy from the lessors all his beer for that public house, and also for a second public house which he held from another landlord, was held binding on an assignee of the second public house with notice of the covenant.

In the case of *L. & S. W. Ry. Co.* v. *Gomm* (20 Ch. D. 562), Jessel, M. R., seemed to consider that the question of notice only arises where the purchaser acquires the legal estate. Alluding to *Tulk* v. *Moxhay*, he said that the doctrine of that case, rightly considered, appeared to him to be either an extension in equity of the doctrine of *Spencer's Case* to another line of cases, or else an extension in equity of the doctrine of negative easements, that it was an equitable doctrine establishing an exception to the rules of common law, which did not treat a restrictive covenant as running with the land. He then went on to state that the purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden, but not if he took only an equitable estate: see p. 583. This statement of the law was perhaps scarcely necessary for the decision of the case then before the Court, and it is a view which does not seem altogether to coincide with the judgments in the other cases cited above, which make the covenant binding or not according as the purchaser had or had not notice of it, independently of any question as to whether he had acquired the legal or only an equitable estate: and see *Carter* v. *Williams*, L. R. 9 Eq. 678.

Omission of word "assigns."

The omission of the word "assigns," though important on the question whether a covenant runs with the land at law, is stated by James, L. J., to be immaterial in equity: see *Renals* v. *Cowlishaw*, 11 Ch. D. 866, 868. And if notice is proved they will be bound although not named: see *Whatman* v. *Gibson*, 9 Sim. 196; *Wilson* v. *Hart*, L. R. 1 Ch. 463. See, however, the judgment of Selwyn, L. J., in *Keates* v. *Lyon*, L. R. 4 Ch. 218, 226. In *Kemp* v. *Bird* (5 Ch. D. 549, affirmed *Ibid.* 974), it was expressly provided that the covenant should not be

binding on the assigns. See also *Jay* v. *Richardson*, 30 Beav. 563.

Tulk v. *Moxhay* applicable only to restrictive covenants.

The doctrine laid down in *Tulk* v. *Moxhay* does not extend to affirmative covenants compelling a person to lay out money or do any act, but only to restrictive or negative covenants: *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; *L. & S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 562. A covenant in terms positive may in substance be negative, as that the covenantee shall have the exclusive right of supplying beer to the covenantor: *Catt* v. *Tourle*, L. R. 4 Ch. 654.

Lessee of assignee bound.

Not only is a purchaser with notice of the restrictive covenant bound, but a lessee or yearly tenant holding under him is equally bound, although he is precluded from inquiring into his lessor's title: *Clements* v. *Welles*, L. R. 1 Eq. 200; *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Feilden* v. *Slater*, L. R. 7 Eq. 523; *Patman* v. *Harland*, 17 Ch. D. 353; *Nicoll* v. *Fenning*, 19 Ch. D. 258. But in this case the restrictive covenant must be such as he would have discovered if he had inquired into his lessor's title, and he will not be bound by a covenant contained in a separate deed of which the conveyance to his lessor would have given no notice: *Carter* v. *Williams*, L. R. 9 Eq. 678; and see *Parker* v. *Whyte*, 1 H. & M. 167.

Mutual covenants on sale of building land.

Where land is sold in several lots for building, with restrictions as to the size or position of the houses, if the covenants were entered into solely for the benefit of the vendor, the purchaser of one lot cannot enforce the covenants as against the purchasers of the other lots, see *ante*, p. 227. But wherever the restrictions are intended to be mutually binding upon the several purchasers, each successive purchaser and his assigns can enforce them against all the other purchasers and their assigns, with notice, without regard to the dates of the original purchase deeds: *Whatman* v. *Gibson*, 9 Sim. 196; *Western* v. *Macdermott*, L. R. 2 Ch. 72; *Gaskin* v. *Balls*, 13 Ch. D. 324.

Small breaches.

In such cases the purchaser of one of the lots can insist upon the benefit of the covenant as against his adjoining owner, although other small breaches by other owners and even by himself have not been interfered with: *Western* v. *Macdermott*, L. R. 2 Ch. 72. But he cannot insist upon the removal of a

Ch. XII. s. 3.

building which has been acquiesced in for a considerable time: *Gaskin* v. *Balls*, 13 Ch. D. 324.

Covenants relaxed in favour of some purchasers.

A vendor who has relaxed covenants restricting building in favour of some of his purchasers cannot insist upon them as against the others: *Roper* v. *Williams*, T. & R. 18; even though such others purchased and entered into the covenants after the vendor had acquiesced in the breaches by the other purchasers: *Peek* v. *Matthews*, L. R. 3 Eq. 515. But this rule does not apply to covenants not to use the land in a particular way, and a vendor who has not prevented some of the purchasers from opening schools or beerhouses in contravention of their covenants can nevertheless insist upon the covenants as against other purchasers (*Kemp* v. *Sober*, 1 Sim. N. S. 517; *Mitchell* v. *Steward*, L. R. 1 Eq. 541), the distinction being that a private house which has been used for some business can become again a private house as soon as it ceases to be so used, but that buildings are permanent: see 1 Sim. N. S. p. 522.

Acquiescence.

Acquiescence in an infringement does not preclude the covenantee from objecting to a greater infringement of the same covenant. Thus, where a building above the prescribed height had been acquiesced in for some time, the owner was prevented from raising it still higher: *Lloyd* v. *London, Chatham & Dover Ry. Co.*, 2 De G. J. & S. 568, 578.

Alteration of character of property.

If the vendor entirely alters the character of the adjoining land so as to make the covenants entered into by a purchaser from him inapplicable to the present condition of the property, he cannot insist upon the covenants being enforced: *Duke of Bedford* v. *Trustees of British Museum*, 2 Myl. & K. 552. So where the character of the neighbourhood has been for some time altered by the manner in which the several purchasers of a building estate have built upon and occupied their lots in violation of the covenants entered into by them, it is too late for one of the purchasers who has acquiesced in the changes to insist upon the covenants being performed: *Sayers* v. *Collyer*, 28 Ch. D. 103.

Permission to the purchaser of an outlying piece of the property to use it in a manner infringing the covenant but not interfering with the general building scheme is not sufficient to

prevent the covenantee from insisting upon the covenant as regards the other purchasers: *German* v. *Chapman*, 7 Ch. D. 271.

Covenants against trades.

A covenant not to carry on any trade or business, or a covenant to use the house as a private dwelling-house only, is broken by using it as a shop, although no structural alteration is made: *Wilkinson* v. *Rogers*, 2 De G. J. & S. 62; or as a school: *Kemp* v. *Sober*, 1 Sim. N. S. 517; or as a home for working girls whether any payment is made or not: *Rolls* v. *Miller*, 27 Ch. D. 71; and see *German* v. *Chapman*, 7 Ch. D. 271; or as a hospital: *Bramwell* v. *Lacy*, 10 Ch. D. 691.

Covenant not to cause a nuisance.

A covenant not to do anything which shall be a nuisance to the adjoining property is not broken by any user which does not amount to a nuisance in the legal sense of the word: *Harrison* v. *Good*, L. R. 11 Eq. 338; and see the judgment of Sir William Erle in *Brand* v. *Hammersmith Ry. Co.*, L. R. 2 Q. B. 247.

Overruled. Rothwell v. Benham 66 L.T. 199

Covenant not to keep a public house.

A covenant not to use a house as a public house or as a beer house is not broken by the sale of beer under an "off licence" for the sale of beer not to be drunk on the premises: *Pease* v. *Coats*, L. R. 2 Eq. 688; *L. & N. W. Ry. Co.* v. *Garnett*, L. R. 9 Eq. 26; *Holt & Co.* v. *Collyer*, 16 Ch. D. 718. *Secus*, if the covenant is not to use the house as a beer shop, "beer house" having acquired a technical meaning, but not so "beer shop:" *Bishop of St. Albans* v. *Battersby*, 3 Q. B. D. 359; *London and Suburban Building Co.* v. *Field*, 16 Ch. D. 645; *Nicoll* v. *Fenning*, 19 Ch. D. 258.

A covenant not to use the house as a public house, or for the sale of spirituous liquors, or ale, or beer, is not broken by the sale, in the course of a grocer's business, of wine in bottles, but is broken by the sale of spirits in bottles: *Feilden* v. *Slater*, L. R. 7 Eq. 523. But a covenant not to use the house as a public house, or for the business of a seller by retail of wine, beer or spirituous liquors, is not broken by the sale, in the course of a grocer's business, of wine or spirits in bottle: *Jones* v. *Bone*, L. R. 9 Eq. 674. These cases were both decided by Sir William James, V.-C., who distinguished the two covenants, and refused to carry the doctrine laid down in the former case any further.

Covenant not to forfeit licences.

A covenant not to do anything which may make void or affect the licences is not broken by two convictions for offences which are not indorsed on the licence: *Wooler* v. *Knott*, 1 Ex. D. 265. If both the convictions had been indorsed, the licence would have been affected, because a third offence would necessarily involve forfeiture under the Licensing Acts; but it may be doubtful whether the licence would have been affected within the meaning of the covenant by one conviction being indorsed. See judgment of Mellish, L. J., *ibid.* p. 267.

Covenant to buy beer.

A covenant to buy beer only of the covenantee implies an obligation on his part to supply good marketable beer, and if he fails to do so the covenantor may buy his beer elsewhere: *Luker* v. *Dennis*, 7 Ch. D. 227; *Edwick* v. *Hawkes*, 18 Ch. D. 199.

Covenant not to assign.

A covenant not to assign is not broken by granting an underlease for a shorter term: *Church* v. *Brown*, 15 Ves. 258, 265; nor by parting with the possession without any actual assignment: *West* v. *Dobb*, L. R. 5 Q. B. 460; *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461. But it is broken by an actual assignment by one of two lessees of his interest in the lease to the other made on the dissolution of partnership: *Varley* v. *Coppard*, L. R. 7 C. P. 505.

Where the lease stipulates that the consent of the lessor to an assignment is not to be unreasonably withheld this does not amount to a covenant on the part of the lessor to give his consent, but if he withholds it unreasonably the lessee may assign without it: *Treloar* v. *Bigge*, L. R. 9 Ex. 151; *Sear* v. *House Property Society*, 16 Ch. D. 387.

CHAPTER XIII.

DOWER AND CURTESY.

SECT.		PAGE	SECT.		PAGE
1. *Dower*	. . . .	235	2. *Curtesy*	. . . .	237

SECT. 1.—*Dower.*

UNDER the old law of dower the widow had a right to have allotted to her for her life one-third of all the lands and hereditaments of which her husband was seised for an estate of inheritance in possession, in severalty or in common, but not in joint tenancy, at any time during the coverture, even though the husband afterwards alienated the land. Dower under the old law.

Hence the old method of barring dower by the intervention of a trustee of an outstanding legal term, by which the husband never became seised for an estate of inheritance in possession.

Dower did not extend to equitable estates.

With regard to women married after the 1st January, 1834, the Dower Act (3 & 4 Will. IV. c. 105), s. 4, enacts that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will; and by sect. 5 all charges and incumbrances to which his land shall be subject shall be valid against the right of his widow to dower. The Dower Act. Alienation.

A general devise to trustees upon trust to sell is as much within the Act as a specific devise: *Lacey* v. *Hill*, L. R. 19 Eq. 346; dissenting from *Rowland* v. *Cuthbertson*, L. R. 8 Eq. 466. Dower excluded by general devise.

A declaration that his widow shall not be entitled to dower in the deed by which the land is conveyed to a man, or in any deed executed by him, will exclude the right to dower: Sect. 6. Declaration against dower.

If the declaration is contained in the conveyance it is suffi-

Ch. XIII. s. 1.

cient, although the purchaser does not execute: *Fairley* v. *Tuck*, 27 L. J. Ch. 28.

Dower in equitable estates.

The right to dower is extended by the Act to land in which the husband had an equitable estate of inheritance in possession, other than an estate in joint tenancy: Sect. 2.

Gavelkind.

In gavelkind lands dower consists of an interest in a moiety during the life of the widow, or until she marries again. The Dower Act extends to such lands: *Farley* v. *Bonham*, 2 J. & H. 177.

Woman married before Act.

By the Dower Act the question of dower is reduced to comparatively small proportions. So far as a purchaser is concerned he must see that where a woman still alive was married on or before the 1st January, 1834, the conveyance to her husband, whether dated before or after the Act, was made to the old uses to bar dower, otherwise the concurrence of the wife must be obtained to release her right to dower. The concurrence of the dower trustee is in no case necessary: *Collard* v. *Roe*, 4 De G. & J. 525.

Release of dower.

A wife who, for the purpose of releasing her dower, joins with her husband in the mortgage of his real estate, loses her right to dower, and is not entitled to redeem: *Dawson* v. *Bank of Whitehaven*, 6 Ch. D. 218, distinguishing *Jackson* v. *Parker*, Amb. 687, and *Jackson* v. *Innes*, 1 Bli. 104.

But a widow whose right to dower has already arisen, joining with her husband's heir-at-law in a mortgage, does not thereby lose her right, and is entitled to have it assigned to her on the mortgage being redeemed: *Meek* v. *Chamberlain*, 8 Q. B. D. 31.

Woman married after Act.

If the woman was married after the 1st January, 1834, her right to dower can only arise where her husband has died intestate as to the land in question, and there is no declaration against her dower within the 6th section. Against such a woman a conveyance executed before the Dower Act, though made to uses to bar dower, and with a declaration against dower for any present or future wife, is of no avail. She is not barred by the old uses, and the declaration being made before the Act is held not to apply: *Fry* v. *Noble*, 7 De G. M. & G. 687; *Clarke* v. *Franklin*, 4 K. & J. 266.

After dissolu-

No right to dower exists after a decree for dissolution of

marriage, although made on the ground of the husband's misconduct: *Frampton* v. *Stephens*, 21 Ch. D. 164. Protection of marriage.

Arrears of dower cannot be recovered for more than six years. See 3 & 4 Will. IV. c. 27, s. 41. Arrears of dower.

In copyhold lands it depends upon the custom whether the widow is entitled to freebench, and to what extent. Usually freebench consists of a life interest in a third, and can be defeated by the alienation of the husband *inter vivos*, or by will. But an intending purchaser should satisfy himself as to this. Freebench.

The Dower Act does not extend to copyholds: *Smith* v. *Adams*, 5 De G. M. & G. 712; *Powdrell* v. *Jones*, 2 Sm. & G. 407.

Sect. 2.—*Curtesy.*

On the death of a woman solely seised of or equitably entitled to an estate in fee simple, or fee tail in possession, her husband surviving is entitled to his curtesy, *i. e.*, to an estate for life, provided there has been issue of the marriage born alive who might by possibility have inherited the estate. This interest extends to land to which the wife was entitled for her separate use: *Appleton* v. *Rowley*, L. R. 8 Eq. 139; *Cooper* v. *Macdonald*, 7 Ch. D. 288; *Eager* v. *Furnivall*, 17 Ch. D. 115, overruling *Moore* v. *Webster*, L. R. 3 Eq. 267. Curtesy.

The estate by curtesy is defeated (1) where the wife is not entitled for her separate use, by the conveyance of the wife and husband; (2) where she is entitled for her separate use, by her disposition by deed or will: *Cooper* v. *Macdonald*, 7 Ch. D. 288. The Married Women's Property Act, 1882, does not alter the rights of the husband in his wife's property after her death. Consequently, wherever property has descended from a married woman, the purchaser should satisfy himself that there is no husband entitled to curtesy. When defeated by alienation.

In gavelkind lands curtesy extends only to a moiety, and ceases on the re-marriage of the husband. Curtesy in gavelkind.

In copyhold or customary lands the right to curtesy, if any, depends upon the custom. In copyholds.

Schools & Colleges exempted from liability to succession duty after 6 yrs from date of notice of succession to Inland Revenue & 12 yrs after date of last payment or 2 yrs after last instalment under sec 22 of Act of 1888 or (in absence of such notice or payment) 12 yrs after event giving rise to such duty & 238 or if such 12 yrs expire within 6 yrs after passing of the Act 6 yrs from such passing

CHAPTER XIV.

SUCCESSION DUTY.

Succession duty.

UNDER the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), duty is payable wherever any person becomes beneficially entitled under any instrument or by operation of law to any property (which for the purposes of the Act includes real and leasehold property) or the income thereof upon the death of any person dying after the 19th May, 1853. See sects. 2, 10. As to the meaning of "upon the death of any person," see *Ring* v. *Jarman*, L. R. 14 Eq. 357.

Joint tenancy.

Duty is also payable where joint tenants take by survivorship: Sect. 3.

General power of appointment.

A person to whom a general power of appointment is given becomes on exercising that power entitled to the property as a succession derived from the donor of the power, and pays duty accordingly: Sects. 4, 33. And the person to whom he appoints becomes entitled to the property as a succession from the donee of the power, and pays duty accordingly: *Att.-Gen.* v. *Upton*, L. R. 1 Ex. 224. But this does not apply where a general power is given in a family settlement to a father and son so that one may be a check upon the other; such a power is not equivalent to joint property in the two donees, and the person to whom they appoint takes the property as a succession from the donor of the power of appointment: *Charlton* v. *Att.-Gen.*, 4 App. Cas. 427; and see *Att.-Gen.* v. *Floyer*, 9 H. L. C. 477; *Att.-Gen.* v. *Dowling*, 6 Q. B. D. 177; *Att.-Gen.* v. *Mitchell*, 6 Q. B. D. 548.

Limited power of appointment.

The person to whom the donee of a limited power appoints takes the property as a succession from the donor of the power: Sect. 4.

Extinction of charges.

The extinction of a charge on property determinable on the

death of any person confers a succession *pro tanto* on the owner of the property: Sect. 5.

Charities and corporations.

Property coming to a charity on a succession is liable to duty: Sect. 16; and so is real property coming to any corporation on a succession: Sect. 27.

When payable.

The duty is a first charge on the interest of the successor and of all persons claiming in his right: Sect. 42. But it does not become payable until the successor or person claiming under him becomes entitled in possession: Sect. 20; and see *Lord Lilford* v. *Att.-Gen.*, L. R. 2 H. L. 63.

Purchaser liable.

If before the successor shall have become entitled in possession he alienates his interest, the property will become liable to the duty in the hands of the purchaser. See sects. 15, 44.

Sale by tenant for life and remainderman.

Thus, where a tenant for life and remainderman sell to a purchaser, the estate will in the hands of such purchaser become liable to duty on the death of the tenant for life: *Re Cooper and Allen's Contract*, 4 Ch. D. 802; but if the purchaser dies before the tenant for life, and duty is paid on his death, no further duty will be payable when the tenant for life dies: *Ibid.*

Whether a purchaser from a tenant for life and remainderman can insist upon their commuting the duty under sect. 41 (a duty which, according to *Re Cooper and Allen's Contract*, will never be payable if the purchaser while still in possession dies before the tenant for life) has never been actually decided. It would seem from the concluding words of the judgment in that case that he can, at any rate where he purchases the entire estate under one contract. If he purchased the interests of the tenant for life and remainderman separately, he could not in the absence of agreement insist upon the latter commuting the duty, because he has purchased the right to succeed to the tenant for life, which carries with it the tax on the succession: *Cooper* v. *Trewby*, 28 Beav. 194.

Trust for sale.

Where property is subject to a trust for sale, the interest of any successor in the purchase-moneys is liable to legacy duty (see sect. 29), which would not be charged on the land in the hands of a purchaser. And the interest of any successor in money to be laid out in land is liable to succession duty: see sect. 30.

Chap. XIV.

Sale under a power.

Where land is sold under a power of sale the duty is charged substitutively upon the purchase-money and upon all land acquired in substitution for the land sold, which becomes free from duty in respect of all interests which are subject to the power of sale: Sect. 42. It has even been held that the land was thereby freed from duty in respect of an interest created by a prior settlement, viz. a jointure which was not subject to the power of sale, and which the jointress concurred to release: *Dugdale* v. *Meadows*, L. R. 6 Ch. 501. This decision, however, is stated to be not recognised as valid by the Crown, and to be manifestly wrong, see Dav. Conv. II. 313, 4th ed.

Sale under Settled Land Act, 1882.

A sale by the Court under the Settled Estates Act, 1877, has the same effect as a sale under a power within the 42nd section, and by shifting the duty on to the purchase-money, frees the land in the hands of a purchaser: *Re Warner's Settled Estates*, 17 Ch. D. 711. It seems clear that the same result must follow on the sale by a tenant for life under the Settled Land Act, 1882.

Assessment of duty.

The value of the succession upon which the duty is to be paid is calculated in the following manner:—The annual value of the property, after making certain allowances, has to be ascertained, and then the tables in the Schedule of the Act give the value of the succession according to the age of the successor. See sect. 21.

Rate of duty.

The rate of duty is as follows (see sect. 10):—

Where the successor is a lineal descendant or ancestor of the predecessor	1 per cent.
Where he is a brother or sister or descendant of such	3 „
Where he is an uncle or aunt or descendant of such	5 „
Where he is a great-uncle or great-aunt or descendant of such	6 „
Otherwise	10 „

If the husband or wife of the successor is of nearer consanguinity to the predecessor, the rate of duty is that which such husband or wife would have been chargeable with: Sect. 11.

Payable by instalments.

The amount of the duty having been ascertained, it may be paid in eight half-yearly instalments, the first being payable at the expiration of twelve months after the successor becomes entitled in possession. If the successor being only entitled for life dies before all the instalments have been paid, any instalment not due at his death ceases to be payable. If he had any further interest in the property which he was competent to dispose of by will, *e. g.* an estate in fee simple, the unpaid instalments are a continuing charge on such further interest. See sect. 21.

Commutation.

The commissioners may receive duty in advance at a discount (sect. 40), and may commute future duties: Sect. 41.

Exemption of small properties.

Exemption from duty is given where the whole succession or successions derived from the same predecessor, and passing upon any death to any person or persons, does not amount to 100*l.* in value, and also where any succession is of less value than 20*l.* See sect. 18.

Receipt for duty sufficient discharge.

A purchaser, however, need not concern himself with the amount of duty payable, for by sect. 52 it is provided that every receipt purporting to be in discharge of the whole duty shall exonerate a *bonâ fide* purchaser for valuable consideration and without notice from such duty, notwithstanding any suppression or misstatement in the account.

CHAPTER XV.

REQUISITIONS.

SECT.		PAGE	SECT.		PAGE
1.	*What requisitions should be made*	242	2.	*Waiver of requisitions*	247
			i.	*By laches and acquiescence*	247
			ii.	*By taking possession*	249

SECT. 1.—*What Requisitions should be made.*

Perusal of abstract.

IT is the duty of the purchaser's counsel on perusing the abstract to make such objections and requisitions as are suggested by the state of the title, and to put queries when further information is necessary. The purchaser's right of inquiry is usually limited by special stipulations in the contract; but, subject to this limitation and any defects covered thereby, the result of the requisitions ought to be that the purchaser will enjoy a secure title to the property.

Classification of requisitions.

Using the term "Requisitions" in its most general sense, it comprises:—

(1) Requisitions on the Abstract.

(2) Requisitions on the Title.

(3) Requisitions on the Evidence of Title.

(4) Requisitions on the Use and Occupation of the Property.

Requisitions on the abstract.

Root of title.

First as to requisitions on the abstract. The contract generally provides that the title shall commence with a certain will or deed; but in the absence of stipulation the purchaser is entitled to insist on a proper root of title. A purchase deed whereby the property was conveyed for valuable consideration is the most perfect document with which to commence an abstract of title. But failing this, a settlement on marriage or a specific devise may be satisfactory. A general devise must be supplemented by evidence (unless expressly excluded by the

contract) of the testator's seisin at the time of his death; and also, where the will was made before 1838, by evidence of his seisin at the date of the will.

A disentailing deed or an appointment in exercise of a power are not good roots of title, because their efficacy depends on something which preceded them, viz. the creation of the entail or the document conferring the power. But the purchaser cannot now require the production, or any abstract or copy of any deed, will, or other document dated or made before the time prescribed by law (generally forty years), or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser: Conv. Act, 1881, s. 3.

A voluntary conveyance is not a good root of title: *Re Marsh and Earl Granville*, 24 Ch. D. 11.

It may be assumed that no satisfactory abstract is furnished unless the root of title shows the entire legal and equitable interest in the property sold to have been *primâ facie* transferred to or vested in some person by the document selected as the starting point.

Length of title.

The purchaser is entitled not only to a good root of title, but also to one of sufficient antiquity. The length of title which can be required has been already discussed. See Ch. VIII. s. 3, p. 193.

Complete abstract.

If the abstract is not complete (as to which see *ante*, p. 191), a further abstract should be called for; and the time for delivering requisitions on the supplemental abstract will not begin to run until it is delivered.

Requisitions on the title.

Secondly, as to the requisitions on the title. These are so endless in their variety, that it would be useless to attempt to give any summary of what they may contain; but it may be said that a complete knowledge of real property law can alone give confidence to the practitioner that he has overlooked nothing in the preparation of his requisitions. There are, however, some points which occur so frequently that it may not be altogether without practical utility to direct attention to them.

Legal estate.

The legal estate should always be carefully traced. Whenever it is by any instrument vested in trustees, it should be seen

Ch. XV. s. 1.

that those trustees, or the survivors or survivor of them, or the heirs, devisees, executors, or administrators of the last survivor, as the case may be, are parties to and *execute* the deed which subsequently deals with the property.

Questions frequently arise on the construction of wills, whether the legal estate is vested in the trustees or not, and whether they take the fee, or only a limited interest commensurable with their duties. These questions depend materially upon whether the will is governed by the old or the new law. The Act for the amendment of the laws with respect to wills (1 Vict. c. 26) applies only to wills made on or after the 1st January, 1838, or re-executed, or re-published, or revived by any codicil after that date. Thus the 1st January, 1838, is a date which it is important to bear in mind.

Powers.

When the execution of a power is a link in the chain of title, it should be carefully observed whether it is authorised by the terms of the instrument creating the power. This, of course, applies not only to beneficial interests, but also to appointments of new trustees. When the vendors are trustees selling under a power of sale, the trusts should be abstracted so far as to show who is the tenant for life, or other limited owner, whose consent is required by the Settled Land Act, 1882, s. 56 (2). See the Settled Land Act, 1884, s. 6.

Mortgages and charges.

Whenever a mortgage is created it should be subsequently shewn to have been satisfied, or the concurrence of the mortgagee in the conveyance should be required. The satisfaction of an equitable mortgage may be proved by a receipt for the money; but where it is a legal mortgage, a reconveyance is requisite by a properly stamped deed, executed by parties competent to convey and give a discharge for the money. If annuities are charged on the property, the annuitants should be required to concur in the sale, or their deaths should be proved. Neither the vendor nor his solicitor is bound to answer an inquiry whether he knows of any settlement, deed, fact, omission, or incumbrance, affecting the property not disclosed by the abstract: *Re Ford and Hill*, 10 Ch. D. 365.

Dower.

If the estate has been conveyed to uses in bar of dower, no requisition on the subject is necessary; but if any owner of

the property was seised of an estate of inheritance, and he may have been married before 1834 to a woman who may be still living, the question should be asked, "Was A. B. married before 1834, and is his wife still living?"

Curtesy.

When the title is traced by descent from a married woman, the questions should be asked, "Did the husband of A. B. survive her, was he entitled to curtesy, and is he still living?"

Succession duty.

It is important to remember in connexion with the subject of succession duty (as to which, see *ante*, p. 238), that the 19th May, 1853, is the date at which the Act came into operation; and that every "succession" after that date imposes a liability on the estate in respect of duty. The production of the receipt should in all cases be called for.

Descriptions of the property.

If the purchaser is not required to assume, as he commonly is, the identity of the property sold with that described in the muniments of title, the several descriptions should be carefully compared, and any discrepancies noticed. Proof of identity should be required if necessary.

Intestacy and heirship.

Intestacy may be established by the production of letters of administration. Failing these, less formal proof by statutory declaration is usually accepted. In cases where the ancestor made a will, but is alleged to have died intestate as regards the property sold, the probate or an office copy should in all cases be produced and inspected. Where the property is stated to have passed under a general devise, the whole will should be examined to see whether there was any specific devise which affected the property.

The heirship of any particular individual is seldom required to be strictly proved, and a statutory declaration by some member of the family is generally accepted as sufficient.

Evidence of title.

Thirdly, as to requisitions on the evidence of title.

Strict evidence is rarely required or forthcoming of all the facts and documents on which the vendor's title depends. This is still more the rule now than in former times, for by the Conveyancing Act, 1881, s. 3 (6), the expenses of verifying the abstract are thrown on the purchaser.

Statutory limitations have also been imposed on the purchaser's rights in this respect. Thus, by the Vendor and Pur-

Ch. XV. s. 1.

chaser Act, 1874, s. 2, recitals, statements and descriptions in documents of title twenty years old at the date of the contract, are made sufficient evidence unless they are proved to be inaccurate. By the Conveyancing Act, 1881, s. 3 (3), the title prior to the time fixed for commencement is put beyond the reach of inquiry. And by these two Acts the right of inquiring into the lessor's title on the sale or grant of a lease or underlease is taken away. See V. & P. Act, s. 2; Conv. Act, ss. 3 (1), 13.

Deeds.

The abstracted statements of deeds are proved by the production of the originals, which should be seen to have been executed by all proper parties, and duly stamped and attested. Where the property is situated in Yorkshire or Middlesex, the provisions as to registration should also be noticed, and if a deed or will is not registered the purchaser should require it to be registered at the expense of the vendor.

Wills.

The probate or an office copy of all abstracted wills should be called for. See 20 & 21 Vict. c. 77, s. 4. And if the land is situated in Yorkshire or Middlesex, registration within six months of the testator's death is necessary. See *Chadwick* v. *Turner*, L. R. 1 Ch. 310, and the Vendor and Purchaser Act, 1874, s. 8. But in the case of Yorkshire, notice of the will may, under the recent Act (47 & 48 Vict. c. 54, s. 11), be registered instead of the will itself.

Births, deaths and marriages.

As to the evidence of births, deaths, and marriages, see p. 199.

As to the evidence required of the performance of the covenants in a lease or underlease, see the Conv. Act, 1881, s. 3.

Evidence, when matter of title.

It should be noticed that, for the purpose of determining when a title is first made out, there is an important distinction between two kinds of facts stated in the abstract. The verification of an abstract, whereby a title is deduced by certain deeds and documents is a mere question of evidence, and the title is made out when the abstract is delivered. There are other facts, however, such as the identity of two individuals of the same name, the evidence of which is itself matter of title; and until the evidence has been given, a good title has not been shown: *Sherwin* v. *Shakspeare*, 17 Beav. 267, 275; see also *Moody to Yates*, 28 Ch. D. 661; Fry on Sp. Perf. 584.

Fourthly, as to requisitions on the use and occupation of the property.

Use and occupation.

If the property is in the occupation of tenants, the leases or agreements under which they hold should be called for, and they should be required to be properly stamped.

Tenants.

The inquiry of the occupiers as to the terms of their holdings should never be omitted.

Inquiry should also be made as to the existence of rights of way or other easements.

Easements.

The nature and amount of the outgoings to which the property is subject should be ascertained by inquiry, and provision made for their apportionment between the vendor and purchaser.

Outgoings.

Sect. 2.—*Waiver of Requisitions.*

The purchaser may waive his right to insist upon a good title being shown either by tacit acquiescence, as by not delivering requisitions, or by acts inconsistent with an intention to insist upon any objections, as by taking possession under certain circumstances.

Waiver, how shown.

The purchaser may be held to have waived his right to send in any requisitions at all, as in the cases of *Pegg* v. *Wisden* (16 Beav. 239), *Margravine of Anspach* v. *Noel* (1 Mad. 310), or only to have waived his right to have particular requisitions satisfied, in which case he will only be considered to have accepted the title so far as he was made cognizant of it, and if anything is kept back by the vendor, he is not as to that bound by his acquiescence: *Bousfield* v. *Hodges*, 33 Beav. 90; and see *Cutts* v. *Thodey*, 13 Sim. 206; *Earl of Darnley* v. *London, Chatham and Dover Ry. Co.*, L. R. 2 H. L. 43.

To what waiver extends.

Waiver of objections to title does not necessarily involve waiver of right to compensation. It is a question of evidence whether such right was waived: *Hughes* v. *Jones*, 3 De G. F. & J. 307.

Where the contract provides that requisitions shall be sent in by a particular day, and that all requisitions not sent in by that

Requisitions not sent in by day fixed.

Ch. XV. s. 2.

time are to be considered waived, the purchaser must send in his requisitions by the day. But this does not apply where the abstract sent was imperfect, or where the requisition arose out of matters subsequently appearing: *Blacklow* v. *Laws*, 2 Hare, 40; *Want* v. *Stallibrass*, L. R. 8 Ex. 175; *Warren* v. *Richardson*, You. 1; and see *ante*, p. 76.

Objection as to validity of contract.

What amounts to waiver will depend somewhat upon the nature of the objection. Thus, where it extends to the validity of the contract, the purchaser should take it as soon as he becomes aware of it, otherwise, if he continues to treat the contract as still subsisting, he will be held to have waived the objection: *Flint* v. *Woodin*, 9 Hare, 618.

Objection to title.

Where the objection is to the title, the purchaser will be deemed to have acquiesced if he fails to take the objection within a reasonable time: *Colton* v. *Wilson*, 3 P. Wms. 191; *Fordyce* v. *Ford*, 4 Bro. C. C. 497; *Dyer* v. *Hargrave*, 10 Ves. 505; *Smith* v. *Capron*, 7 Hare, 185. What is a reasonable time will depend upon the particular circumstances of the case and the conduct of the parties; even long acquiescence and possession of the property may not be sufficient to compel a purchaser to complete where the title is manifestly bad: *Blachford* v. *Kirkpatrick*, 6 Beav. 232. It will also depend to a great extent upon the perfection or imperfection of the abstract: *Cutts* v. *Thodey*, 13 Sim. 206. In fact, waiver to be effectual must be made with knowledge of the circumstances: *Earl of Darnley* v. *London, Chatham & Dover Ry. Co.*, L. R. 2 H. L. 43.

By lapse of time.

A purchaser in possession, who received the abstract and made no requisitions upon it for five months, but simply required the vendor to verify it with the deeds, was held to be precluded from making objections to the title: *Pegg* v. *Wisden*, 16 Beav. 239.

Waiver by acquiescence

So a purchaser having knowledge of a defect in the title and giving notice to the vendor to complete, cannot afterwards set up the defect as a defence in an action for specific performance: *Macbryde* v. *Weekes*, 22 Beav. 533.

Admissions in statement of defence.

Where in an action for specific performance the purchaser had by his answer admitted that the vendor was entitled at the date of the contract, he was not afterwards permitted to raise

the objection that no abstract had been delivered and no title shewn: *Phipps* v. *Child*, 3 Drew. 709.

Two grounds of objection.

But where a purchaser having two grounds of objection to the title insists upon one which is held insufficient, it does not follow that he will be held to have waived the other objection which he kept in the background: *Magennis* v. *Fallon*, 2 Mol. 561, 591.

Supplemental agreement as to requisitions.

In a purchase where a difficulty had arisen in distinguishing freehold from copyhold lands, and a supplemental agreement had been entered into between the parties that the purchaser should be permitted to take possession and that the vendor should furnish a declaration of identity of the lands, it was held that the purchaser could only insist on the identification of the property whether freehold or copyhold, and not on the distinguishing of any parts as freehold or copyhold: *Dawson* v. *Brinckman*, 3 Mac. & G. 53.

Notice of defect before contract.

Generally it may be laid down that if a purchaser has full notice before the agreement that a good title cannot be made, and he nevertheless goes on with the agreement, he will be held to have waived the right to a good title which is given by law: *Ogilvie* v. *Foljambe*, 3 Mer. 53. But this does not apply to a defect which *non sequitur* that the vendor does not intend to remedy, at any rate if he undertakes to make out a good title: *Barnett* v. *Wheeler*, 7 M. & W. 364; and see *Re Gloag and Miller's Contract*, 23 Ch. D. 320. Ellis v. Rogers 29 Ch D. 661.

Conditional acceptance of title.

A conditional acceptance of the title by the purchaser or by his counsel, is clearly no waiver of objections: *Lesturgeon* v. *Martin*, 3 Myl. & K. 255; *Deverell* v. *Lord Bolton*, 18 Ves. 514.

Counsel's opinion.

But if the purchaser adopts his counsel's opinion that an objection may be waived, and deals with the vendor upon that view, he will be held to have acquiesced in the waiver: *Alexander* v. *Crosby*, 1 Jo. & Lat. 666.

Draft.

So the forwarding of a draft conveyance without taking any objection to the title may amount to a waiver of the right to make requisitions: *Clive* v. *Beaumont*, 1 De G. & S. 397.

Waiver by taking possession.

The mere fact of taking possession by the purchaser does not amount to a waiver of his right to call for the vendor's title: *Simpson* v. *Sadd*, 4 De G. M. & G. 665; and see *Seaton* v.

Ch. XV. s. 2.

Booth, 4 A. & E. 528; not even if he exercises acts of ownership over the property, as by levelling and draining: *Osborne* v. *Harvey*, 1 Y. & C. C. 116. And even making a lease of the property has been stated to be not conclusive evidence of an intention to waive questions as to the title: *Ex parte Sidebotham*, 1 Mont. & A. 655, 2 Mont. & A. 146.

But *primâ facie* taking possession after an abstract has been delivered, and not in pursuance of any provision in the contract, is a waiver of the objections appearing on the abstract, and it lies on the purchaser to rebut this presumption: *Bown* v. *Stenson*, 24 Beav. 631. For after a purchaser has enjoyed the subject-matter of the contract, every presumption must be made in favour of its validity: *Port of London Assurance Company's case*, 5 De G. M. & G. 465.

Possession under contract.

In the recent case of *In re Gloag and Miller's Contract* (23 Ch. D. 320), the following distinctions were made, viz., between cases in which the contract provides that a good title shall be shown, and also provides that possession may be taken by the purchaser before the title is completed, and cases in which the purchaser takes possession without any express stipulation in the contract; and again, between cases in which the objections to the title of

Removable defects.

which the purchaser knows are removable by the vendor, and cases in which they are irremovable.

With regard to the first of the distinctions taken above, where the contract expressly provides for possession being taken by the purchaser, no presumption of waiver as to title arises from his so doing: see *Knatchbull* v. *Grueber*, 3 Mer. 124, 144.

As to the second of such distinctions, if the purchaser, knowing of an objection as one which the vendor cannot remove, as a reservation of sporting over the property in favour of a third person, nevertheless enters into possession, he is held to have waived that objection: *Burnell* v. *Brown*, 1 Jac. & W. 168.

Length of possession.

The length of time during which a purchaser has been in possession is always a material fact. Thus, where the purchaser had been in possession, and for two years after delivery of abstract had made no requisition, specific performance was decreed without a reference as to title: *Margravine of Anspach* v. *Noel*, 1 Mad. 310; and a purchaser who made vexatious objec-

tions to complete, but remained for a long time in possession, was equally held to have waived his right to investigate the title: *Hall* v. *Laver*, 3 Y. & C. Ex. 191; and see also *Dixon* v. *Astley*, 1 Mer. 133; *Calcraft* v. *Roebuck*, 1 Ves. jun. 221; *Fludyer* v. *Cocker*, 12 Ves. 27; *Fleetwood* v. *Green*, 15 Ves. 594.

Waiver excluded by contract.

But no presumption of waiver arises where it appears from the contract or negotiations that the purchaser should take immediate possession, and should not pay his purchase-money until the vendor has made out his title: *Burroughs* v. *Oakley*, 3 Sw. 159; *Southcomb* v. *Bishop of Exeter*, 6 Hare, 213; *Stevens* v. *Guppy*, 3 Russ. 171; or where the contract has been entered into under a common mistake as to the title: *Jones* v. *Clifford*, 3 Ch. D. 779.

Neither does any such presumption arise where the purchaser took possession relying on the statement by the vendor that he had a good title: *Hearn* v. *Tomlin*, Peake, N. P. C. 191; *Vancouver* v. *Bliss*, 11 Ves. 458.

Still less if there is any element of fraud in the vendor's representations: *Small* v. *Attwood*, You. 407, 6 Cl. & Fin. 232.

What amounts to possession.

If the purchaser has the keys, this is being in possession: *Guest* v. *Homfray*, 5 Ves. 823. Possession by a purchaser's lessee is the possession of the purchaser: *Ex parte Sidebotham*, 1 Mont. & A. 655. And if the purchaser not only enters upon but mortgages the property, this will be additional ground for holding that he has waived objections to the title: *Haydon* v. *Bell*, 1 Beav. 337.

Purchaser turned out.

Any presumption which might arise from the purchaser taking possession would be rebutted by the vendor turning him out again: *Knatchbull* v. *Grueber*, 3 Mer. 124.

CHAPTER XVI.

SEARCHES.

SECT.		PAGE	SECT.		PAGE
1.	*In the central office* .	. 252	2.	*In the county register* .	. 254

SECT. 1.—*In the Central Office.*

BEFORE the completion of the purchase a search should be made in the central office for judgments and executions, crown debts, *lis pendens*, and annuities.

Judgments, Crown debts, and *lis pendens*.

The search for judgments, crown debts, and *lis pendens* should extend for a period of five years immediately preceding the completion, and it should strictly be in the names of all persons who have owned the property beneficially during those five years.

Annuities.

The search for annuities should be for the whole period during which the registry has been in existence,—that is, since 1855; but it is usually considered sufficient to search in the name of the vendor only.

In names of trustees and mortgagees.

Where the sale is by trustees who can sell without the consent of the beneficiaries, or by mortgagees, a search for *lis pendens* alone is generally sufficient.

Judgments.

Searches for judgments are regulated by a series of Acts passed in the present reign.

Registration

By the Act 1 & 2 Vict. c. 110, s. 11, the whole of the debtor's lands were rendered liable to be taken in execution, instead of a moiety only under the Statute of Westminster; and by sect. 13 judgments were made to operate as charges upon the land. By sect. 19 judgments were required to be registered.

Re-registration.

By the Act 2 & 3 Vict. c. 11, s. 4, all judgments were declared to be void as to purchasers, mortgagees, or creditors, unless re-registered within five years before the conveyance or mortgage.

Notice.

Doubts having arisen as to whether, notwithstanding the Act, judgments were void as against persons having notice of them, the Acts 3 & 4 Vict. c. 82, s. 2, and 18 & 19 Vict. c. 15, ss. 4, 5, provide that no judgment shall affect the lands as against purchasers, mortgagees, or creditors, unless and until registered or registered within five years, any notice of the judgment to such purchasers, mortgagees, or creditors notwithstanding.

Writ of execution registered.

By the Act 23 & 24 Vict. c. 38, ss. 1, 2, no judgment is to affect the lands as to a *bonâ fide* purchaser or mortgagee, whether having notice of the judgment or not, unless a writ of execution is issued and registered in the name of the creditor before the conveyance or mortgage is completed; and no writ of execution shall affect the land unless execution is enforced within three months from the time of registration.

Lands taken in execution.

By the Act 27 & 28 Vict. c. 112, s. 1, no judgment is to affect any land until the same shall have been actually delivered in execution. Every writ is to be registered as provided by 23 & 24 Vict. c. 38, but in the name of the debtor instead of the creditor: Sect. 3.

The result of the above-mentioned Acts is as follows:—

1. Judgments entered up before the 23rd July, 1860 (the date of the commencement of 23 & 24 Vict. c. 38), do not affect the purchaser unless they have been re-registered within five years before the completion of his purchase.

2. Judgments entered up between the 23rd July, 1860, and the 29th July, 1864 (the date of the commencement of 27 & 28 Vict. c. 112), do not affect the purchaser unless they have been re-registered within five years before the completion of his purchase, and a writ of execution has been registered in the name of the creditor, and execution has been enforced within three months from the date of its registration.

3. Judgments entered up after the 29th July, 1864, do not affect the purchaser unless the land is actually delivered in execution.

Crown debts.

As to crown debts and accountantships to the crown, which are debts by specialty, the Acts 2 & 3 Vict. c. 11, s. 8, and 22 & 23 Vict. c. 35, s. 22, provide for their registration and re-registration. The Act 28 & 29 Vict. c. 104, s. 48, provides that

Ch. XVI. s. 1.

no judgment obtained after the 5th July, 1865, in respect of any crown debt shall affect the lands as to a *bonâ fide* purchaser or mortgagee, whether with or without notice, unless a writ of execution is issued and registered before the completion of the purchase or mortgage.

Lis pendens.

A *lis pendens* does not bind any purchaser or mortgagee without express notice, unless and until a memorandum is registered, and, if necessary, re-registered within five years. See 2 & 3 Vict. c. 11, s. 7.

Annuities.

Annuities, in order to affect purchasers and mortgagees without notice, must be registered under 18 & 19 Vict. c. 15, s. 12. No provision having been made for the re-registration of annuities, the search should extend over the whole period since 1855 that the registry has been in existence.

A purchaser is bound by notice of an annuity, although not registered: *Greaves* v. *Tofield*, 14 Ch. D. 563.

Searches in the Central Office.

By the Conveyancing Act, 1882, s. 2, a means is provided by which searches may be made by the officer of the Court instead of by the solicitor. In favour of a purchaser as against persons interested in the judgment or other matter recorded, the certificate of such officer shall be conclusive: Sub-sect. 3.

If preferred, the purchaser or his solicitor may himself make the search, as formerly: Sub-sect. 7. But solicitors, trustees, and others in a fiduciary capacity, are authorized to have the search made by the officer: Sub-sects. 8, 9.

A fresh certificate of result need not be obtained on each transaction, for an office copy of a certificate obtained on a former occasion will cover the time up to the date of such search: Sub-sect. 8.

Sect. 2.—*In the County Register.*

Middlesex and Yorkshire.

In the case of land in Middlesex or Yorkshire, or Kingston-upon-Hull, the county registers must also be searched over the period for which title is shown. See, for Middlesex, the Act 7 Anne, c. 20; for Yorkshire and Kingston-upon-Hull, 47 & 48 Vict. c. 54.

Official search in Yorkshire.

In Yorkshire the search may, if preferred, be made by the officer. His certificate of the result will be receivable in evidence, and solicitors and trustees will not be answerable for any error in such certificate; but the certificate is not made conclusive against an entry which has been overlooked by the officer. See sects. 20—23.

Exceptions from the Acts.

The Middlesex Registry Act does not extend to copyholds, leases at a rack rent, or any lease not exceeding twenty-one years, where the actual possession and occupation go along with the lease, or to any of the chambers in Serjeant's Inn, the Inns of Court, or Inns of Chancery. See sect. 17.

The Yorkshire Registries Act does not extend to copyholds, leases not exceeding twenty-one years, or any assignment thereof, where accompanied by actual possession from the making of such lease or assignment. See sect. 28.

Land registered under the Land Transfer Act, 1875, is exempted from the county register. See sect. 127.

CHAPTER XVII.

INTEREST AND POSSESSION.

SECT.		PAGE
1.	*Position of parties after contract*	256
	i. *Vendor a trustee for purchaser*	256
	ii. *Purchaser a trustee for vendor*	257
2.	*Interest on purchase-money*	257
	i. *When it commences*	257
	ii. *Rate*	258
	iii. *Appropriation of purchase-money*	258
3.	*Purchaser's right to possession*	259
	i. *Correlative with vendor's right to interest*	259
	ii. *Possession taken by purchaser before completion*	259
	iii. *Possession retained by vendor after time for completion*	260
4.	*Purchaser's lien for deposit*	261

SECT. 1.—*Position of Parties after the Contract.*

Vendor trustee for purchaser, with lien for purchase-money.

"THE effect of a contract for sale has been settled for more than two centuries. The moment there is a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate, until the purchase-money is paid in the absence of express contract, or to the time of delivering possession:" per Jessel, M.R., *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 338.

Thomas, 34 L.D. 166.

To what extent vendor is trustee.

But though the vendor thus constructively becomes a trustee for the purchaser, he is not a mere trustee. "He is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey:" per Plumer, M. R., *Wall* v. *Bright*, 1 Jac. & W. 494, 503. In fact "the purchaser has neither a legal

nor an equitable right, as against the seller, until he pays the purchase-money:" per Sugden, L. C., *Baldwin* v. *Belcher*, 1 J. & Lat. 18, 26; and see *Re Cuming*, L. R. 5 Ch. 72. But "every portion of the purchase-money paid in pursuance of the contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does in equity finally transfer to the purchaser the ownership of a corresponding portion of the estate:" per Lord Westbury, L. C., *Rose* v. *Watson*, 10 H. L. C. 672, 678.

Vendor not a bare trustee.

Nor is the vendor a "bare trustee" within the Land Transfer Act, 1875, s. 48: *Morgan* v. *Swansea Sanitary Authorities*, 9 Ch. D. 582; although it has never been clearly ascertained what is a "bare trustee": *Ibid.;* and see *Christie* v. *Ovington*, 1 Ch. D. 279.

The rule that the purchaser becomes in equity the owner of the property only applies as between the parties to the contract (and presumably persons whose interests they can bind), and cannot be extended so as to affect the interests of others: *Tasker* v. *Small*, 3 My. & Cr. 63, 70.

Purchaser trustee for vendor.

The purchaser becomes a trustee of the purchase-money for the vendor: *Evans* v. *Tweedy*, 1 Beav. 55, 58; but not an express trustee within the 25th section of 3 & 4 Will. IV. c. 27: *Toft* v. *Stephenson*, 1 De G. M. & G. 28; 5 De G. M. & G. 735.

As to the vendor's lien for his unpaid purchase-money, see Ch. XVIII.

Sect. 2.—*Interest on Purchase-Money.*

Interest runs from day for completion,

In the absence of any express stipulation, as to which see p. 96, *ante*, the vendor is entitled to interest on the purchase-money from the day for completion: *Acland* v. *Gaisford*, 2 Mad. 28; and see *Dyer* v. *Hargrave*, 10 Ves. 505; *Fenton* v. *Browne*, 14 Ves. 144.

or when good title shown,

If no time is fixed for completion interest will run as from the time when a good title is shown: *Enraght* v. *Fitzgerald*, 2 Dru. & War. 43; *Binks* v. *Lord Rokeby*, 2 Sw. 222; *Jones* v. *Mudd*, 4 Russ. 118; *Carrodus* v. *Sharp*, 20 Bea. 56; unless the

or possession taken.

purchaser has taken possession, when interest will commence from the time of so doing: *Tindal* v. *Cobham*, 2 Myl. & K. 385; *Att.-Gen.* v. *Christchurch*, 13 Sim. 214; even though he does so before the time fixed for payment of the purchase-money: *Fludyer* v. *Cocker*, 12 Ves. 25; *Birch* v. *Joy*, 3 H. L. C. 565; and even though the land is untenanted so that he receives no rents and profits: *Ballard* v. *Shutt*, 15 Ch. D. 122.

On sale of reversion.

The vendor is entitled to interest even where the property is reversionary: *Ex parte Manning*, 2 P. Wms. 410; *Enraght* v. *Fitzgerald*, 2 Dru. & War. 43; *Wallis* v. *Sarel*, 5 De G. & S. 429.

Rate of interest.

The rate of interest will be 4 per cent. unless otherwise agreed (*Calcraft* v. *Roebuck*, 1 Ves. jun. 221), or under special circumstances, 5 per cent., see *Firth* v. *Midland Ry. Co.*, L. R. 20 Eq. 100.

Appropriation of purchase-money.

But whether there be an express stipulation as to interest or not, if delay arises from the state of the title, the purchaser will not be bound to pay interest after he has set aside a sum to answer the purchase-money and has given notice to the vendor that it is lying idle: *Howland* v. *Norris*, 1 Cox, 59; *Winter* v. *Blades*, 2 Sim. & St. 393; *Regent's Canal Co.* v. *Ware*, 23 Bea. 575; *Denning* v. *Henderson*, 1 De G. & S. 689; *Dyson* v. *Hornby*, 4 De G. & S. 481; *Kershaw* v. *Kershaw*, L. R. 9 Eq. 56; *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Golds and Norton*, 33 W. R. 333; but the purchaser should make a sufficient appropriation: as to which, see the above cases; and if he keeps the money lying unproductive he may be put to his option either to pay interest or to give up the rents: *Cowpe* v. *Bakewell*, 13 Beav. 421.

In *Lewis* v. *South Wales Ry. Co.* (10 Hare, 113), the company were held not liable for interest after payment into Court, although they had agreed to pay interest up to completion of purchase, completion being construed as completion on their part.

Income tax.

A purchaser may deduct income tax from the interest which he has to pay on the purchase-money: *Bebb* v. *Bunny*, 1 K. & J. 216; *Crane* v. *Kilpin*, L. R. 6 Eq. 334.

Sect. 3.—*Purchaser's Right to Possession.*

Possession or rents and profits.

Correlative with the right of the vendor to interest in the purchase-money is the right of the purchaser to possession of the property or to the rents and profits received by the vendor until possession is given: *Acland* v. *Gaisford*, 2 Mad. 28; *Dyer* v. *Hargrave*, 10 Ves. 505; *Fenton* v. *Browne*, 14 Ves. 144; *Cheetham* v. *Sturtevant*, 3 De G. & S. 468.

What amounts to possession.

By possession is not necessarily meant actual personal possession where the property is stated to be in the occupation of a tenant: *Lake* v. *Dean*, 28 Beav. 607. But it is otherwise if the purchaser expressly stipulates for possession by a certain day as of a house for his own residence: *Tilley* v. *Thomas*, L. R. 3 Ch. 61. See *post*, p. 277.

On a sale by agreement to the London School Board they were held entitled, after depositing the purchase-money, not only to possession but to pull down the house: *Bolton* v. *London School Board*, 7 Ch. D. 766.

Possession pending investigation of title.

Where the purchaser has been let into possession pending investigation of title, and it afterwards appears that the contract cannot be completed owing to want of title in the vendor, such possession by the purchaser is not of itself sufficient to render him liable for use and occupation, even though his occupation may have been beneficial to himself: *Winterbottom* v. *Ingham*, 7 Q. B. 611. At any rate, he will not be liable if the vendor has induced him to take possession by misrepresenting his title: *Hearn* v. *Tomlin*, Peake, N. P. C. 191. Nor will he be liable if he has paid his purchase-money, in which case one will take back his money and the other his property: *Kirtland* v. *Pounsett*, 2 Taunt. 145.

Possession after rescission of contract.

But if the purchaser continues in possession after the contract has been rescinded, he may be held liable for use and occupation during such subsequent period: *Howard* v. *Shaw*, 8 M. & W. 118; and see *Smith* v. *Jackson*, 1 Mad. 618.

Possession after failure by vendor to make out title.

And even if the contract has not gone off, yet if, on the vendor being unable to make out a good title, the purchaser refuses either to abandon the agreement or to accept such title as the vendor has, he will be liable to account to the vendor for

rents and profits during his occupation: *King* v. *King*, 1 Myl. & K. 442; *Hope* v. *Hope*, 22 Beav. 351, 365.

Fraud in purchaser.

If the purchase is set aside on the ground of fraud in the purchaser, he may be decreed to pay an occupation rent for such time as he has been in possession, and to receive back his purchase-money with interest: *Donovan* v. *Fricker*, Jac. 165.

Express agreement to pay rent.

If the purchaser expressly agrees to pay so much a year during his occupation until completion, such sums as become due will be regarded as rent, leviable under 8 Anne, c. 14; *Saunders* v. *Musgrave*, 6 B. & C. 524.

Purchase by tenant.

A contract by a tenant-at-will to purchase from his landlord puts an end to the tenancy: *Daniels* v. *Davison*, 16 Ves. 249; but not a contract by a tenant from year to year: *Ibid.*, *Doe* v. *Stanion*, 1 M. & W. 695; nor by a tenant holding under a lease: *Tarte* v. *Darby*, 15 M. & W. 601. See also *Paton* v. *Brebner*, 1 Bli. 42, 76; Sug. V. & P. 178. In such latter cases the vendor must put an end to the tenancy by sufficient notice to quit before he can bring ejectment: *Doe* v. *Burton*, 16 Q. B. 807.

Payment of purchase-money on possession taken.

The mere fact of the purchaser entering into possession pending completion does not entitle the vendor to call upon him for payment of the purchase-money: *Cutler* v. *Simons*, 2 Mer. 103. But he may in a proper case be ordered to pay the money into Court: *Ibid.*; and see *post*, p. 468.

Improvements by purchaser.

If the purchaser being let into possession executes repairs and improvements in the property, and it subsequently appears that a good title cannot be made, he may be entitled to a lien on the estate for purchase-money if paid, and for repairs and lasting improvements: *Edwards* v. *McLeay*, 2 Sw. 287; *Neesom* v. *Clarkson*, 4 Hare, 97; but in that event he may also have to account for rents and profits during his occupation: *Ibid.*

As to the right of the purchaser to make or insist on objections to title after taking possession, see Ch. XV., s. 2, p. 249.

Possession retained by the vendor.

If the vendor remains in possession after the time for completion he will be liable to an occupation rent: *Dyer* v. *Hargrave*, 10 Ves. 505. And the same will be the case on a sale to a railway company: *Metropolitan Ry. Co.* v. *Defries*, 2 Q. B. D 387; unless there is something in the agreement or in the con-

duct of the purchaser to negative his right: *Leggott* v. *Metropolitan Ry. Co.*, L. R. 5 Ch. 716.

It has been held at law that where the vendor retained possession after the time for completion, he did not become a tenant to the purchaser, and liable for use and occupation: *Tew* v. *Jones*, 13 M. & W. 12. But where a sub-purchaser had been let into possession, and had subsequently given up possession to the original vendor on a misunderstanding that the contract was not binding on such vendor, on specific performance being ultimately decreed against him, the vendor was held liable to the sub-purchaser for use and occupation: *Hull* v. *Vaughan*, 6 Pri. 157.

Account on footing of wilful default.

A vendor who remains in possession after the time for completion will not, as a rule, be charged on the footing of wilful default, unless a special case is made out: *Sherwin* v. *Shakspeare*, 5 De G. M. & G. 517; and see *Wilson* v. *Clapham*, 1 Jac. & W. 36.

Sect. 4.—*Purchaser's Lien for Deposit.*

When vendor unable to complete.

If a purchaser has advanced money in payment or part payment for the purchase, he is entitled, if the vendor is unable to complete, to a lien on the estate to secure repayment: *Wythes* v. *Lee*, 3 Drew. 396. See also *Lacon* v. *Mertins*, 3 Atk. 1, 4; *Burgess* v. *Wheate*, 1 Eden, 177, 211.

Purchaser in default.

There is no lien where the purchaser has himself abandoned the contract: *Dinn* v. *Grant*, 5 De G. & S. 451; or where the contract has gone off by the default of the purchaser: *Ex parte Barrell*, L. R. 10 Ch. 512; and see *Wallis* v. *Smith*, 21 Ch. D. 243.

To what lien extends.

The lien covers interest at 4 per cent. on the purchase-money paid, and costs: *Turner* v. *Marriott*, L. R. 3 Eq. 744; *Torrance* v. *Bolton*, L. R. 8 Ch. 118; also interest which the purchaser has paid on unpaid purchase-money: *Rose* v. *Watson*, 10 H. L. C. 672, 682; outlay on improvements expended in accordance with a contract to grant a lease: *Middleton* v. *Magnay*, 2 H. & M. 233; and, in a proper case, moneys expended on lasting improvements: *Neesom* v. *Clarkson*, 4 Hare, 97.

A lien cannot, except under special circumstances, be established over property situate abroad, even as against defendants within the jurisdiction: *Norris* v. *Chambres*, 29 Beav. 246; and see *Penn* v. *Lord Baltimore*, 1 Ves. sen. 444; *Norton* v. *Florence Land Co.*, 7 Ch. D. 332.

The lien does not exist when the estate is in the possession of the purchaser, but only when it is in the hands of the vendor: *Burgess* v. *Wheate*, 1 Eden, 177, 211; *Wythes* v. *Lee*, 3 Drew. 396; or persons claiming under him: *Rose* v. *Watson*, 10 H. L. C. 672. And it prevails to the extent of the vendor's interest in the land: *Wythes* v. *Lee*.

As against subsequent mortgagees.

Where, after a contract to sell an estate, the vendor mortgages it, the purchaser is, as against the mortgagee, entitled to a lien on the estate, not only for his deposit, but also for any further portion of the purchase-money paid by him in accordance with the contract, although he has notice of the mortgage, until the mortgagee requires payment to be made to himself: *Rose* v. *Watson*, 10 H. L. C. 672.

Lien of sub-purchaser.

If the purchaser, having paid a deposit subsequently and before completion, sells to another who pays him a deposit, such sub-purchaser will be entitled to a lien on any money repaid by the vendor on being unable to complete: *Aberaman Ironworks* v. *Wickens*, L. R. 4 Ch. 101.

A trustee for the purchase of an estate advancing part of the purchase-money is entitled to a charge on the land: *Re Pumfrey*, 22 Ch. D. 255.

When payments are made by a person under a mistaken idea that he is entitled to purchase the property, on the Court determining to whom the benefit of the contract belonged, and to whom the property ought to have been conveyed, a lien on the land will be declared in favour of the person so paying the purchase-money by mistake: *Maddison* v. *Chapman*, 1 J. & H. 470; and see *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1.

CHAPTER XVIII.

VENDOR'S LIEN.

SECT.		PAGE
1.	*How the lien arises*	263
i.	*When it arises*	263
ii.	*Over what property*	263
iii.	*In respect of what purchase-money*	264
iv.	*Against what persons*	266
2.	*How lost*	267
3.	*How enforced*	268
4.	*Locke King's Acts*	269
5.	*Lien on land taken by a railway company*	270

SECT. 1. *How the Lien arises.*

THE settled doctrine of vendor's lien for unpaid purchase-money is thus stated by Lord St. Leonards in his work on Vendors and Purchasers, p. 670, 14th ed.: "Where a vendor delivers possession of an estate to a purchaser, without receiving the purchase-money, equity, whether the estate be or be not conveyed, and although there was not any special agreement for that purpose, and whether the whole or only part of the money is unpaid, gives the vendor a lien on the land for the money." See also *Mackreth* v. *Symmons*, 15 Ves. 329, 337. When the lien arises.

"There is a natural equity that the land should stand charged with so much of the purchase-money as was not paid; and that, without any special agreement for that purpose." Per Cur., *Chapman* v. *Tanner*, 1 Vern. 267. See also *Kettlewell* v. *Watson*, 26 Ch. D. 501, 507.

The lien arises so soon as the vendor delivers possession to the purchaser, whether the conveyance has been executed or not: *Smith* v. *Hibbard*, Dick. 730; *Toft* v. *Stephenson*, 1 De G. M. & G. 28; *Andrew* v. *Andrew*, 8 De G. M. & G. 336.

The lien extends, not only over freeholds, but also over copyholds (*Winter* v. *Lord Anson*, 3 Russ. 488, 492; *Wrout* v. *Dawes*, 25 Beav. 369) and leaseholds: *Matthew* v. *Bowler*, 6 Hare, 110; *Re Brentwood Brick Co.*, 4 Ch. D. 562. Over what property.

Chap. XVIII. s. 1.

Illegal contract.

There is no lien if the contract be illegal: *Harrison* v. *Southcote*, 2 Ves. sen. 389, 395; *Ewing* v. *Osbaldiston*, 2 My. & Cr. 53, 88.

In respect of what purchase-money.

Instalments.

The lien may be for the whole or any part of the purchase-money unpaid: *Mackreth* v. *Symmons*, 15 Ves. 329; even where the contract provides for payment by instalments: *Nives* v. *Nives*, 15 Ch. D. 649; but not where it provides for payment after the property has been again sold by the purchaser: *Ex parte Parkes*, 1 G. & J. 228. See, however, *Langstaff* v. *Nicholson*, 25 Beav. 160.

Annuity.

According to the preponderance of authority, a vendor who sells in consideration of an annuity has a lien on the land in respect of the annuity, even though it is also secured by the bond of the purchaser. It has, indeed, been laid down that there is no lien of necessity on such a sale, and that it will depend upon the circumstances of each particular case: *Dixon* v. *Gayfere*, 1 De G. & J. 655, where Lord Cranworth, L. C., said, p. 661, "I should be slow to believe that the purchaser and vendor could possibly have understood that the estate was to be inalienable for so long a period as it would be if the annuity were charged on it, since an incumbrance of that description would not be redeemable at the option of the landowner."

This view, however, is disapproved of by Lord St. Leonards (see Sug. V. & P. p. 676—678), and it is contrary to the decisions of Lord Camden in *Tardiffe* v. *Scrugham* (cited 1 Bro. C. C. 423), and of Lord Eldon in *Mackreth* v. *Symmons*.

Conveyance in consideration of annuity, with a covenant to pay.

The fact that the deed conveying the property in consideration of the annuity also contains a covenant by the purchaser to pay the annuity does not exclude the lien: *Matthew* v. *Bowler*, 6 Hare, 110; and see *Richardson* v. *McCausland*, Beat. 457.

Conveyance in consideration of covenant to pay annuity.

But if it appears from the conveyance that the parties intended the consideration to be, not the payment of the annuity, but the covenant to pay it, then no lien arises, and slight indications of such intention are sufficient.

Thus, where the purchase deed contained an indorsed receipt for "a bond for 3,000*l.*, being the full consideration within expressed to be given," and by an instrument of even date,

which must be construed in the same manner and as if it formed part of one entire transaction, the purchaser gave his bond for payment of an annuity of 100*l.* during the lives of the vendor and her husband, and of a further sum of 3,000*l.* which was only payable in certain events, it was held that this was not the case of a security but a substitution for the price which the vendor had agreed to accept, that she had got everything which she bargained for, and that the lien for the annuity and the further sum of 3,000*l.* did not exist: *Parrott* v. *Sweetland*, 3 Myl. & K. 655.

So where the deed stated the conveyance to be in consideration of certain annuities having been granted by the purchaser by a deed of even date, it was held that inasmuch as the conveyance was made expressly in consideration of that deed, the vendor having got what he contracted to have, no lien remained for the annuities: *Buckland* v. *Pocknell*, 13 Sim. 406.

Conveyance in consideration of a covenant to do a thing.

Wherever the consideration is expressed to be, not the doing a thing, but the covenant to do it, no lien arises.

Thus, in *Clarke* v. *Royle* (3 Sim. 499), where land was conveyed in consideration of the covenants therein contained, one being for payment of an annuity during the life of the vendor, the other for payment of a sum of 3,000*l.* in a certain contingency, it was held that no lien existed for the 3,000*l.* The vendor had received his annuity till his death, so no question arose upon that.

So where the consideration for the transfer of its property by a society to a company was the undertaking of all liabilities of the society by the company, it was held, on the latter being wound up, that the society had no lien on the property it had transferred: *Re Albert Life Assurance Co.*, L. R. 11 Eq. 164, in which case Sir James Bacon, V.-C., thus stated the law, p. 178:— "If it be expressed, or can be safely and properly inferred from documentary or other evidence, or from the nature of the contract, that it was the intention of the parties that the sale or transfer, however absolute in its terms, was subject to the condition that the purchase-money should be paid, or that the thing contracted to be done by the vendee should be performed, the lien will prevail. If, on the other hand, no such inference can

Chap. XVIII. s. 1.

be properly drawn—if the performance of the thing contracted to be done by the vendee was not the condition upon which the transfer was made, but the engagement to do the thing was the consideration for the transfer, the vendor, having accepted that engagement, has the very thing he bargained for, and cannot say that the consideration has not passed to him. In such cases the lien cannot prevail."

Contract inconsistent with lien.

Generally it may be said that there will be no lien wherever the terms of the contract are inconsistent with such an intention.

Thus where, on a sale to a trustee for a company, the agreement was that the purchase-money should be paid out of future capital, the vendor, inasmuch as he got a higher price by agreeing to accept payment in such a manner, was held to have no lien on the property: *Re Brentwood Brick Co.*, 4 Ch. D. 562.

Against whom the lien prevails.

The vendor's lien prevails over the land not only in the hands of the purchaser but also of his heir (*Smith* v. *Hibbard*, Dick. 730; *Hearle* v. *Boteler*, Cary, 35), and of his trustee in bankruptcy: *Fawell* v. *Heelis*, Amb. 724, 726; *Rome* v. *Young*, 3 Y. & C. Ex. 199; *Andrew* v. *Andrew*, 8 De G. M. & G. 336.

Against a purchaser for value with notice.

The lien also prevails against a purchaser for value who had notice that the money was not paid: *Cator* v. *Bolingbroke*, 1 Bro. C. C. 301; *Elliot* v. *Edwards*, 3 Bos. & Pul. 181; *Mackreth* v. *Symmons*, 15 Ves. 340, 349. Such notice may be constructive, as where the vendor retains the deeds, though even this precaution may not be sufficient security, see *Kettlewell* v. *Watson*, 26 Ch. D. 501; or the notice may be through the purchaser's solicitor: *Frail* v. *Ellis*, 16 Beav. 350; *Smith* v. *Evans*, 28 Beav. 59. The mere fact of the vendor remaining in possession as tenant to the purchaser is not notice to a subsequent purchaser that the purchase-money is still unpaid: *White* v. *Wakefield*, 7 Sim. 401.

Purchaser without notice.

As against a purchaser for value without notice, the lien will not prevail, even though such purchaser does not obtain the legal estate: *Rice* v. *Rice*, 2 Drew. 73; and see *Hunter* v. *Walters*, L. R. 7 Ch. 75.

Conveyancing Act, 1881, s. 55.

In deeds executed after the commencement of the Conveyancing Act, 1881, a receipt in the body or indorsed is, in

favour of a purchaser without notice, sufficient evidence of payment, sect. 55.

In Yorkshire.

In Yorkshire, every lien for unpaid purchase-money, of which a memorandum is not registered, will be of no effect as against any assurance for valuable consideration which is registered: sect. 7 of the Yorkshire Registries Act, 1884; and see *post*, p. 329.

Against *cestuis que trust*.

Where a purchase is made by trustees with trust money, a vendor, who has improperly allowed one of the trustees to retain part of the purchase-money, will not be entitled, as against the *cestuis que trust*, to a lien on the estate: *White* v. *Wakefield*, 7 Sim. 401. It is not necessarily improper for a vendor who knows that he is dealing with trustees to allow part of the purchase-money to remain unpaid, nor will he be disentitled to a lien: *Ibid.*; and see *Muir* v. *Jolly*, 26 Beav. 143, 146. In this last case, Romilly, M. R., held that, inasmuch as the vendor had taken an equitable mortgage from the trustee to secure the money, which was recited as being lent by the vendor to the trustee, he had lost his lien, and inasmuch as the trustee had no power to mortgage, his security was gone, and therefore the *cestuis que trust* were entitled to the estate without paying for it. It does not seem to have been considered whether, if the mortgage was void, the vendor could not revert to his lien.

Sect. 2.—*How the Lien is lost.*

If the vendor not content with his lien on the land takes another security for the unpaid purchase-money, the question arises whether such security was intended to be in addition to or in substitution for the lien.

Onus on purchaser.

This must be determined according to the circumstances of each particular case: *Mackreth* v. *Symmons*, 15 Ves. 349. But the onus of showing a substitution lies on the purchaser: *Hughes* v. *Kearney*, 1 Sch. & L. 132; *Collins* v. *Collins*, 31 Beav. 346.

Bond or note accepted by vendor.

The mere acceptance by the vendor of the bond of the purchaser (*Saunders* v. *Leslie*, 2 B. & Beat. 509; *Winter* v. *Lord Anson*, 3 Russ. 488), or promissory note (*Hughes* v. *Kearney*,

1 Sch. & L. 132; *Ex parte Loaring*, 2 Rose, 79), or bill of exchange (*Grant* v. *Mills*, 2 Ves. & B. 306; *Ex parte Peake*, 1 Mad. 346), is not sufficient to discharge the lien.

Mortgage of other property.

Even a mortgage of another estate for the purchase-money would not be decisive evidence of an intention to give up the lien: *Mackreth* v. *Symmons*, 15 Ves. 349. But a mortgage even for part of the money is strong ground for the inference that a lien for the residue was not intended: *Bond* v. *Kent*, 2 Vern. 281; *Capper* v. *Spottiswoode*, Taml. 21.

Stock transferred as security.

In *Nairn* v. *Prowse* (6 Ves. 752), where a sum of stock was transferred into the name of the vendor as security for the purchase-money, he was held to have waived his lien, although the value of the stock proved to be less than the amount of the purchase-money.

Consent of vendor to a resale.

In a case where an arrangement was made between the vendor, the purchaser, and a third person who had advanced part of the price, that the estate should be resold, and out of the proceeds that all persons having claims in respect of the original sale should be paid, the vendor was held not to be entitled to any lien on the proceeds for the unpaid portion of his purchase-money in preference to the lender: *Cood* v. *Pollard*, 9 Pri. 544, 10 Pri. 109.

Sect. 3.—*How the Lien may be enforced.*

The vendor's remedy in respect of his lien is by action to have it declared that he has an equitable lien on the property for the payment of the purchase-money and interest, and for an account and payment by means of a sale of the estate. See *Barker* v. *Smark*, 3 Beav. 64. If he has taken a bond to secure the purchase-money, it seems that he will not be permitted to pursue both his remedies at the same time. He must elect, and if he fails in one remedy, he may resort to the other: *Ibid.*

Barred by the Statute of Limitations.

The right to recover the purchase-money as a charge upon the land is barred by the lapse of twelve years: 37 & 38 Vict. c. 57, s. 8; *Toft* v. *Stephenson*, 1 De G. M. & G. 28, 5 De G. M.

& G. 735, unless a sufficient acknowledgment is given: *Ibid.*; and such acknowledgment may be by the solicitor of trustees of the will of the purchaser appointed by the Court: *Ibid.* In *Hawkins* v. *Gardiner* (2 Sm. & G. 441), there was an express trust declared of the purchase-money left in the hands of the purchaser.

Sect. 4.—*Locke King's Acts.*

Right to exoneration.

By the series of statutes known as *Locke King's Acts* (17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34) the lien for unpaid purchase-money upon any land purchased by a testator or intestate is placed on the same footing in respect of exoneration as a mortgage; and accordingly the heir or devisee of an estate subject to lien cannot require the purchase-money to be paid out of the personal estate of the intestate or testator.

In a recent case, where the testator had entered into a contract for the purchase of an estate, but had not paid the purchase-money or taken a conveyance, it was held by Kay, J., that there was a vendor's lien, and that the Acts applied: *Re Cockcroft*, 24 Ch. D. 94.

Where the lien is excluded, the heir or devisee would not be precluded by the Acts from requiring the purchase-money to be paid out of the personal estate: *Ibid.*

Marshalling for lien.

Even before Locke King's Acts came into operation, it was held that when an unpaid vendor resorted to the personalty of a deceased purchaser for payment of his purchase-money, the assets would be marshalled in favour of legatees as against the heir (*Sproule* v. *Prior*, 8 Sim. 189) or the devisees (*Lilford* v. *Powys-Keck*, L. R. 1 Eq. 347) of the deceased. The above-mentioned Acts have, by making the land the primary fund for the satisfaction of the lien, made it abundantly clear that the assets will be marshalled in all cases as between the real and personal estates.

SECT. 5.—*Lien on Land taken by a Railway Company.*

The vendor of land sold to a railway company has a lien on the land for the purchase-money, and also for money payable by way of compensation: *Walker* v. *Ware Ry. Co.*, L. R. 1 Eq. 195; but not if the sale is in consideration of a rent-charge: *Earl of Jersey* v. *Briton Ferry Co.*, L. R. 7 Eq. 409; nor for costs of arbitration: *Earl Ferrers* v. *Stafford Ry. Co.*, L. R. 13 Eq. 524.

Though line is leased to another company.

The lien extends over the land, although leased to another company: *Bishop of Winchester* v. *Mid-Hants Ry. Co.*, L. R. 5 Eq. 17, or worked and maintained by another company: *Earl St. Germans* v. *Crystal Palace Ry. Co.*, L. R. 11 Eq. 568.

How enforced.

The lien may be enforced by a sale of the railway: *Walker* v. *Ware Ry. Co.*, L. R. 1 Eq. 195; *Wing* v. *Tottenham Ry. Co.*, L. R. 3 Ch. 740; or by the appointment of a receiver: *Munns* v. *Isle of Wight Ry. Co.*, L. R. 5 Ch. 414; but not by an injunction to restrain the line from being used: *Ibid.*; and see *Pell* v. *Northampton Ry. Co.*, L. R. 2 Ch. 100; *Lycett* v. *Stafford Ry. Co.*, L. R. 13 Eq. 261; unless the company, being well able to pay, wilfully refuse to do so: *Perks* v. *Wycombe Ry. Co.*, 3 Giff. 662; *Cosens* v. *Bognor Ry. Co.*, L. R. 1 Ch. 594; *Stretton* v. *G. W. Ry. Co.*, L. R. 5 Ch. 751, followed by Chitty, J., *Dixon* v. *East & Mid. Ry. Co.*, 28 Sol. J. 362; and at all events not on an interlocutory application made in the action before judgment, even though the company admit their liability: *Latimer* v. *Aylesbury Ry. Co.*, 9 Ch. D. 385; nor on the application of a person claiming adversely to the person from whom the company have purchased: *Webster* v. *S. E. Ry. Co.*, 1 Sim. N. S. 272.

CHAPTER XIX.

CHANGES BETWEEN CONTRACT AND CONVEYANCE.

SECT.		PAGE
1.	*In the property*	271
	i. *Not by the act or default of the vendor*	271
	ii. *By the act or default of the vendor*	272
2.	*In the parties*	273
	i. *Death*	273
	ii. *Bankruptcy*	274
	iii. *Lunacy*	274
	iv. *Assignment*	275

SECT. 1.—*In the Property.*

THE question whether the vendor or the purchaser is to lose or to profit by improvement or deterioration in the property taking place between the date of the contract and the completion of the purchase seems to depend upon whether the improvement or deterioration is owing to the acts or default of the vendor, or to matters over which he has no control. Improvement or deterioration.

In the latter case the benefit or loss accrues to or falls upon the purchaser. Thus he is entitled to any increase in the value of the land by reason of its being required for some particular purpose, as for a railway or docks: *Paine* v. *Meller*, 6 Ves. 349. On a like principle, if he contracts to purchase an estate in consideration of paying an annuity during the life of the vendor, and the vendor dies before any payment becomes due, the purchaser will yet be entitled to have his bargain carried out: *Mortimer* v. *Capper*, 1 Bro. C. C. 156; *Jackson* v. *Lever*, 3 Bro. C. C. 605; but see *Pope* v. *Roots*, 1 Bro. P. C. 370. So if he purchase a reversionary estate and the tenant for life dies: *Revell* v. *Hussey*, 2 B. & Beat. 280, 287. Improvements not by acts of vendor.

On the like principle the purchaser has to bear any loss happening to the property, owing to matters over which the vendor has no control: *Paramore* v. *Greenslade*, 1 Sm. & G. 541; as by the dropping of a life on the purchase of an estate Deterioration not by acts of vendor.

Ch. XIX. s. 1.

for lives: *White* v. *Nutts*, 1 P. Wms. 61; or by an earthquake: *Cass* v. *Rudele*, 2 Vern. 280; but see 1 Bro. C. C. 157, n.; or by the fall of the house owing to its ruinous condition: *Robertson* v. *Skelton*, 12 Beav. 260, in which case the purchaser, being in default in not having completed earlier, was held liable to pay for damage done to neighbouring property by the fall of the house; or by fire: *Paine* v. *Meller*, 6 Ves. 352; but see *Bacon* v. *Simpson*, 3 M. & W. 78, where the contract was for the sale of a house held for the residue of a lease and the furniture in it. See also *Counter* v. *Macpherson*, 5 Moo. P. C. 83.

Benefit of insurance.

Where property contracted to be sold is burnt down before completion, the purchaser will not be entitled to the benefit of any insurance effected by the vendor unless the contract so provides: *Rayner* v. *Preston*, 18 Ch. D. 1; but in such case the vendor will not be entitled to require the insurance money from the office: *Castellain* v. *Preston*, 11 Q. B. D. 380.

Depreciation by acts of vendor.

On the other hand, where the property is depreciated by the act of the vendor, the purchaser will either be released entirely from the contract, or will be entitled to compensation, *e. g.*, if the vendor cuts down ornamental timber: *Magennis* v. *Fallon*, 2 Mol. 561, 590.

Permissive waste by vendor.

Further, if the completion of the purchase is delayed, even without any default on the part of the vendor, the purchaser will be entitled to compensation, if the vendor permits the property to lie waste and deteriorate: *Binks* v. *Lord Rokeby*, 2 Sw. 222; *Lord* v. *Stephens*, 1 Y. & C. Ex. 222; *Foster* v. *Deacon*, 3 Mad. 394; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575; *Ferguson* v. *Tadman*, 1 Sim. 530; *Thomas* v. *Buxton*, L. R. 8 Eq. 120; *Phillips* v. *Silvester*, L. R. 8 Ch. 173. In fact, the vendor is bound, if necessary, to relet on a yearly tenancy, so as to prevent the land from going out of cultivation: *Earl of Egmont* v. *Smith*, 6 Ch. D. 469; and where proper, in the course of husbandry, he may cut the crops: *Webster* v. *Donaldson*, 34 Beav. 451, and also coppice and timber: *Poole* v. *Shergold*, 1 Cox, 273, 2 Bro. C. C. 118. The question who will be entitled to the profits will apparently depend upon the time fixed for completion, or for taking possession by the purchaser, see *Webster* v. *Donaldson*, 34 Beav. 451.

Vendor must keep up his title.

The vendor must also, unless the purchaser is in default, pay the expenses necessary for keeping up his title, as fines in the case of copyholds: *Paramore* v. *Greenslade*, 1 Sm. & G. 541. As to the necessity for procuring the renewal of a lease, see *Munro* v. *Taylor*, 3 Mac. & G. 713. The vendor of leaseholds must also continue to perform the covenants of the lease, as by keeping up an insurance necessary to prevent the property from being forfeited: *Dowson* v. *Solomon*, 1 Dr. & Sm. 1.

Purchaser in default.

But the rule does not apply where it is by the purchaser's own default that he has not completed the purchase: *Minchin* v. *Nance*, 4 Beav. 332; or where the land becomes vacant owing to his giving the tenant notice to quit: *Harford* v. *Purrier*, 1 Mad. 532.

Sect. 2.—*Changes in the Parties.*

Death of vendor.

The contract is not discharged by the death of the vendor or of the purchaser: *Winged* v. *Lefebury*, 2 Eq. Ca. Ab. 32, pl. 43; Sug. V. & P. 177.

To whom the purchase-money must be paid.

On the death of a vendor who has entered into a contract to sell, the question whether the purchase-money belongs to his heir or devisee on the one hand, or to his legal personal representatives on the other hand, depends upon whether the contract is or is not binding on the vendor: *Att.-Gen.* v. *Day*, 1 Ves. sen. 220.

If the contract is binding the purchase-money belongs to the legal personal representatives of the vendor as from the time fixed for completion: *Baden* v. *Countess of Pembroke*, 2 Vern. 213; *Eaton* v. *Sanxter*, 6 Sim. 517. But until the time fixed for completion the rents of the real estate will belong to the heir or devisee: *Lumsden* v. *Fraser*, 12 Sim. 263. See also *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497.

Option to purchase.

So where a lessor has given an option to purchase to his lessee, and dies before the option is exercised, the purchase-money belongs to his legal personal representatives: *Lawes* v. *Bennett*, 1 Cox, 167; and see *Re Adams and The Kensington Vestry*, 27 Ch. D. 394, 399.

Ch. XIX. s. 2.

Conveyancing Act, 1881, s. 4.

By the 4th section of the Conveyancing Act, 1881, the legal personal representatives are given power to convey the land without the concurrence of the heir or devisee, provided the contract entered into by the vendor was one binding upon him. If there is any doubt as to this, it will be necessary to obtain the concurrence of the heir or devisee.

Death of purchaser.

If the purchaser dies before completion his interest in the property contracted to be bought passes to his heir or devisee, but under Locke King's Act (17 & 18 Vict. c. 113), and the Amendment Acts (30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34), the heir or devisee takes the real estate, charged with any lien which may subsist for the unpaid purchase-money in favour of the vendor; or if the contract is subsequently completed by the legal personal representatives of the purchaser, charged in their favour with the amount of the purchase-money so paid by them: *Re Cockcroft*, 24 Ch. D. 94.

Locke King's Acts will apply unless the purchaser has signified a contrary intention, within the meaning of the said Acts. See 40 & 41 Vict. c. 34, s. 1.

Option to purchase given to lessee.

Where an option to purchase is given in a lease to the lessee, his executors, administrators or assigns, and the lessee dies, the option can be exercised by his legal personal representative, and not by his heir-at-law: *Re Adams and The Kensington Vestry*, 27 Ch. D. 394.

Bankruptcy of vendor.

The bankruptcy of the vendor before completion does not discharge the contract: *Orlebar* v. *Fletcher*, 1 P. Wms. 738; Sug. V. & P. 175.

Bankruptcy of purchaser.

If the purchaser becomes bankrupt before completion, his trustee may either complete the contract, or may disclaim under sect. 55 of the Bankruptcy Act, 1883, which provides that where any part of the property of the bankrupt consists of unprofitable contracts, the trustee, notwithstanding that he has endeavoured to sell, or has taken possession of the property, or exercised any act of ownership in relation thereto, may disclaim the property in manner by the Act provided. But if the trustee disclaims after the title has been accepted, he cannot recover the deposit: *Ex parte Barrell*, L. R. 10 Ch. 512.

Lunacy of either party.

"The result of the authorities seems to be that dealings of

sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding:" per Lord Cranworth, L. C., *Elliot* v. *Ince*, 7 De G. M. & G. 488.

As to the powers of the committee to complete a contract for sale, see the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), s. 122.

Purchaser's equitable interest assigned.

The equitable interest of the purchaser may be the subject of charge or assignment, and the sub-purchaser acquires the same rights as against the original vendor as belonged to the original purchaser: *Wood* v. *Griffith*, 1 Sw. 43, 56; *Baldwin* v. *Belcher*, 1 Jo. & Lat. 18. But the sub-purchaser must assume the position of the vendee, and fulfil the duties and sustain the liabilities created by the contract: *Shaw* v. *Foster*, L. R. 5 H. L. 321, 350; *S. C.* sub nom. *McCreight* v. *Foster*, L. R. 5 Ch. 604; and see *Crabtree* v. *Poole*, L. R. 12 Eq. 13. And the vendor will not be affected by the purchaser's subsequent dealings with his equitable interest, or even entitled to refuse to convey to him unless he has distinct notice of the claims of the sub-purchaser: *Shaw* v. *Foster*, *supra*.

Vendor's lien assigned.

In like manner the vendor's lien for unpaid purchase-money may be made the subject of charge, but the purchaser who pays his purchase-money to the vendor will not be affected by any such dealings of which he has not distinct notice: *London and County Banking Co.* v. *Ratcliffe*, 6 App. Cas. 722; and see *Rose* v. *Watson*, 10 H. L. Cas. 672.

CHAPTER XX.

TIME FOR COMPLETION.

SECT.		PAGE
1.	*The rule in equity*	276
	i. *Time not of the essence of the contract*	276
	ii. *Exceptions*	277
2.	*Time made of the essence by the contract*	278
3.	*Time made of the essence by subsequent notice*	279
4.	*Time for completion may be waived*	280

SECT. 1.—*The Rule in Equity.*

Time not of the essence of the contract.

IT frequently happens that a contract for the sale of land is not completed by the day named in the agreement. In equity time has not been in this respect considered as of the essence of the contract; that is to say, the Courts of Equity have permitted either party to insist upon the fulfilment of the contract within a reasonable time after the day named, although such party was not himself ready to complete by that day: *Lloyd* v. *Collett*, 4 Bro. C. C. 469; *Lennon* v. *Napper*, 2 Sch. & L. 682; *Roberts* v. *Berry*, 3 De G. M. & G. 284; *Tilley* v. *Thomas*, L. R. 3 Ch. 61.

Rule at law.

At law the rule was different, time being regarded as of the essence of the contract. See *Berry* v. *Young*, 2 Esp. 640, note; *Wilde* v. *Fort*, 4 Taunt. 334; *Ex parte Gardner*, 4 Y. & C. Ex. 503; *Maryon* v. *Carter*, 4 Car. & P. 295; *Stowell* v. *Robinson*, 3 Bing. N. C. 928; *Marshall* v. *Powell*, 9 Q. B. 779; *Hanslip* v. *Padwick*, 5 Exch. 615, 623. Now, however, since by the Judicature Act of 1873, s. 25, sub-s. 7, stipulations in contracts as to time are to receive in all Courts the same construction as in a Court of Equity, it does not seem necessary to take any further notice of the variance which used to exist: see *Noble* v. *Edwardes*, 5 Ch. D. 378, 393.

Immediate

The rule in equity that time is not of the essence of the

contract does not apply where it appears from the nature of the subject-matter of the contract that it is important for the purchaser to have possession by the day fixed, *e. g.*, if the contract relates to a business: *Wright* v. *Howard*, 1 Sim. & St. 190; *Parker* v. *Frith*, *ibid.* 199; in fact, wherever the property is required for purposes of trade, the tendency of the Court has been to regard time as material, if not essential, and not to enforce specific performance on behalf of the vendor, unless he is prepared to complete, at any rate within a short time from the day fixed: *Walker* v. *Jeffreys*, 1 Hare, 341, 348, and cases there cited; see also *Sparrow's Case*, cited 2 Sch. & L. 604.

possession required.

Business.

On the sale of a public-house the tendency is to regard the time for giving possession as essential: *Seaton* v. *Mapp*, 2 Coll. 556; *Coslake* v. *Till*, 1 Russ. 376. And if the public-house is sold "as a going concern," it is now settled that time is of the essence of the contract: *Day* v. *Luhke*, L. R. 5 Eq. 336; followed in *Cowles* v. *Gale*, L. R. 7 Ch. 12; and see *Weston* v. *Savage*, 10 Ch. D. 736.

Public-house.

The rule in equity as to time has no application where the property is of fluctuating value, such as mines: *Macbryde* v. *Weekes*, 22 Beav. 533; and see *Doloret* v. *Rothschild*, 1 Sim. & St. 590.

Fluctuating value.

Still less where it is of a steadily diminishing value, as a life estate: *Withy* v. *Cottle*, T. & R. 78.

Nor will the rule apply where the purchaser requires the property for immediate personal occupation: *Levy* v. *Lindo*, 3 Mer. 81, 84; *Gedye* v. *Duke of Montrose*, 26 Beav. 45; *Tilley* v. *Thomas*, L. R. 3 Ch. 61.

For personal residence.

Again, time will be to a great extent regarded as of the essence of the contract, where it is made with a body of a fluctuating nature, such as a dean and chapter: *Carter* v. *Dean of Ely*, 7 Sim. 211.

Parties liable to changes.

Where the vendor requires the money by a certain day for a special purpose, as to pay off mortgages, time will be considered as of the essence of the contract: see *Popham* v. *Eyre*, Lofft, 786, 813; and see remarks of Redesdale, L. C., in *Crofton* v. *Ormsby*, 2 Sch. & L. 604; and so in the case of the sale of a reversionary interest, "for no man sells a reversion who is

Money required.

Ch. XX. s. 1.

not distressed for money:" *Newman* v. *Rogers*, 4 Bro. C. C. 391; *Spurrier* v. *Hancock*, 4 Ves. 667; *Patrick* v. *Milner*, 2 C. P. D. 342, in which case, however, it was held that a provision for payment of interest in case of delay in completion negatived the presumption that time was of the essence of the contract.

When notice must be given.

But in all cases where there is nothing in the nature of the subject-matter of the contract to make time essential, it is necessary that the contract should either make time of the essence of the contract, or should state the purpose for which the money or the property is required (*Seton* v. *Slade*, 7 Ves. 265, 278; *Boehm* v. *Wood*, 1 Jac. & W. 419), or at any rate distinct notice to that effect should be given: *Nokes* v. *Lord Kilmorey*, 1 De G. & S. 444; and see *Webb* v. *Hughes*, L. R. 10 Eq. 281.

Option to purchase.

Where an option to purchase is given, whether by a will, as in *Brooke* v. *Garrod*, 3 K. & J. 608; 2 De G. & J. 62; *Austin* v. *Tawney*, L. R. 2 Ch. 143; or by a lease, as in *Crawford* v. *Toogood*, 13 Ch. D. 153; the option must be exercised strictly within the limit of time fixed. And the same is the case with an option to renew a lease: *Nicholson* v. *Smith*, 22 Ch. D. 640.

Sect. 2.—*Time made of the essence by the Contract.*

Special provision in the contract.

The rule in equity notwithstanding, time will be of the essence of the contract if it is expressly so provided (*Lloyd* v. *Rippingale*, cited 1 Y. & C. Ex. 410); or if it is provided that the contract shall be void (*Hudson* v. *Bartram*, 3 Mad. 440), or may be annulled (*Hudson* v. *Temple*, 29 Beav. 536), if not performed by the day fixed; or if it appears from the stipulations in the contract that the time fixed for completion was intended to be literally complied with: *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401, 417.

But a provision that time shall be of the essence of the contract with respect to the delivery of requisitions, does not make it so for the completion of the contract: *Wells* v. *Maxwell*, 32 Beav. 408; *Honeyman* v. *Marryat*, 21 Beav. 14; 6 H. L. C. 112.

SECT. 3.—*Time made of the essence by subsequent Notice.*

Although the time for completion has not been made of the essence of the contract by the original agreement, it is open to either party to make time of the essence by giving notice to the other party that if he does not complete by a fixed day the contract will be considered at an end. Where this is done, the day fixed must always allow a reasonable time within which to complete.

Reasonable notice.

What is a reasonable time depends entirely upon the particular circumstances of each case. The question of reasonableness must be determined as at the date when the notice is given: *Crawford* v. *Toogood*, 13 Ch. D. 153.

A distinction may be taken between cases in which no time has been fixed by the contract for completion, and cases in which a day has been named.

Where no time fixed by contract.

With regard to the former cases, where the contract limits no time for completion, each party is entitled to a reasonable time for doing the various acts which he has to do; and neither party has any right to limit a particular time within which an act is to be done by the other, unless there has been unreasonable delay on the part of the latter: *Green* v. *Sevin*, 13 Ch. D. 589, 599.

The following are also cases in which, where no time was fixed by the contract, notice was given to complete within a certain time:—*Warde* v. *Jeffery*, 4 Pri. 294; *Benson* v. *Lamb*, 9 Beav. 502; *M'Murray* v. *Spicer*, L. R. 5 Eq. 527; in which cases the notice was given by the purchaser: *Pegg* v. *Wisden*, 16 Beav. 239; *Crawford* v. *Toogood*, 13 Ch. D. 153; in which cases the notice was given by the vendor.

Where time fixed by contract.

Where the time is fixed by the contract and has gone by, either party may by notice bind the other to complete within a reasonable time, to be specified in the notice: *Parkin* v. *Thorold*, 16 Beav. 59, 71; and see *Heaphy* v. *Hill*, 2 Sim. & St. 29; *Wood* v. *Machu*, 5 Hare, 158; *Southcomb* v. *Bishop of Exeter*, 6 Hare, 213; *Taylor* v. *Brown*, 2 Beav. 180; *King* v. *Wilson*, 6 Beav. 124; *Nott* v. *Riccard*, 22 Beav. 307; *Macbryde* v. *Weekes*, *ibid.* 533; in which cases the notice was given by the

Ch. XX. s. 3.

purchaser. And see *Sherwood* v. *Beveridge*, 3 De G. & S. 425; *Whitfield* v. *Lequeutre*, *ibid.* 464; cases in which the sale was by the Court. In the case of *Reynolds* v. *Nelson* (6 Mad. 18), the notice was given by the vendor.

Sect. 4.—*Time for Completion waived.*

Although time is of the essence of the contract, the exact fulfilment by the day named may be waived by enlarging the time.

Express waiver.

This may be done expressly, as by fixing a further day for completion, as in *Nokes* v. *Lord Kilmorey*, 1 De G. & S. 444; *Southcomb* v. *Bishop of Exeter*, 6 Hare, 213; or, after the time has gone by, it may be waived conditionally on immediate completion: *Stewart* v. *Smith*, 6 Hare, 222.

Implied waiver.

The time for completion may also be waived by conduct, as where one party, on being informed that the other could not complete until the day after the day fixed, made no objection: *Carpenter* v. *Blandford*, 3 Man. & Ry. 93.

The time will also be considered as waived if, after its expiration, the purchase is proceeded with (*King* v. *Wilson*, 6 Beav. 124; *Pincke* v. *Curteis*, 4 Bro. C. C. 329), or negotiations on the title are continued (*Webb* v. *Hughes*, L. R. 10 Eq. 281); or the purchaser takes possession: *Boehm* v. *Wood*, 1 Jac. & W. 419.

CHAPTER XXI.

THE CONVEYANCE.

SECT.		PAGE
1.	*Preparation of the conveyance*	281
2.	*The parties*	282
	i. *Legal estate*	282
	ii. *Trust estate*	283
	iii. *Mortgages*	283
3.	*Recitals*	287
4.	*Operative words*	288
5.	*The receipt*	289
	i. *What receipt sufficient*	289
	ii. *Payment to solicitor*	290
6.	*The parcels*	291
	i. *Description of the property*	291
	ii. *Minerals*	291
	iii. *Soil of highway, &c.*	292
6.	*The parcels*—continued.	
	iv. *Rights of way*	293
	v. *Continuous and apparent easements*	294
	vi. *General words*	295
7.	*Covenants for title*	295
8.	*Execution*	298
9.	*Acknowledgment by married woman*	300
10.	*Inrolment*	301
11.	*Production of deeds*	302
	i. *Acknowledgment and undertaking*	302
	ii. *Custody*	303
	iii. *Attested copies*	303

SECT. 1.—*Preparation of the Conveyance.*

Prepared by purchaser.

IT is the duty of the purchaser to prepare the conveyance and tender it to the vendor for execution: *Poole* v. *Hill*, 6 M. & W. 835; and see Sug. V. & P. 241.

Separate conveyances.

The vendor cannot object to convey the property in parcels on receiving the whole purchase-money, and on being paid the additional expense occasioned by his joining in several conveyances instead of one: *Earl of Egmont* v. *Smith*, 6 Ch. D. 469.

Mortgage kept on foot.

Where the property is subject to incumbrances which are to be discharged out of the purchase-money, the purchaser is entitled, instead of taking a re-conveyance to himself, to have the mortgage kept on foot for his protection: *Cooper* v. *Cartwright*, John. 679; and see *Clark* v. *May*, 16 Beav. 273.

The mortgage may be kept on foot either by assigning the debt to a trustee for the purchaser, and conveying the property

Ch. XXI. s. 1.

to the use of the trustee upon trust to secure the debt, and subject thereto in trust for the purchaser, or by inserting a declaration in the conveyance to the effect that the mortgage is to be taken as still subsisting for the protection of the purchaser against mesne incumbrances: *Jameson* v. *Stein*, 21 Beav. 5, 13; *Watts* v. *Symes*, 1 De G. M. & G. 240.

Reconveyance of mortgage.

The reconveyance may be taken direct to the purchaser, or it may be made to the vendor by a previous deed, so as to enable him to convey a clear estate to the purchaser: *Jones* v. *Lewis*, 1 De G. & S. 245. But the purchaser will have to pay the extra costs occasioned by two deeds (*Ibid.*); and it is not clear that he could insist upon having them if the vendor objected: *Reeves* v. *Gill*, 1 Beav. 375. As a rule, the mortgagee should be made to convey the legal estate direct to the purchaser: see *General Finance Co.* v. *Liberator Benefit Society*, 10 Ch. D. 15, 20.

Sect. 2.—*The Parties.*

Legal estate

The person in whom the legal estate is vested must join in the conveyance, for the purchaser will not be compelled to take an equitable title (*Freeland* v. *Pearson*, L. R. 7 Eq. 246; Sug. V. & P. 397), unless he is clearly bound to do so by the contract, as in *Sheerness Waterworks Co.* v. *Polson*, 29 Beav. 70.

It has been held that this rule does not apply where the sale is by the Court, and the legal estate is outstanding in an infant (see Sug. V. & P. 397), and that in such a case the purchaser would be compelled to complete, although he could not himself force such a title on a purchaser from him: *Ibid.* But the purchaser would not be compelled to complete if there was anything more than a dry legal estate, that is an estate without any interest, outstanding in the infant: *Freeland* v. *Pearson*, L. R. 7 Eq. 246.

It is improbable that any such case will arise in the future, because the various Acts, which have been passed during recent years, and to which reference is made below, have rendered it possible, if not easy, to get in every outstanding legal estate which the purchaser has a right to insist upon. It is sufficient

if the vendor gets in the legal estate under the Trustee Acts or otherwise: *Camberwell Building Society* v. *Holloway*, 13 Ch. D. 754.

Where the person in whom the legal estate was vested, either as trustee or as mortgagee, is dead, it becomes necessary to consider who must be made parties in order to obtain a conveyance of that estate.

V. & P. Act, 1874, s. 4.

By the 4th section of the Vendor and Purchaser Act, 1874, which came into operation on the 7th of August, 1874, it was enacted that the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee had been admitted, might, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate. This section was held to apply only to a reconveyance, and not to a transfer: *Re Spradbery's Mortgage*, 14 Ch. D. 514; and see *Re White's Mortgage*, 29 W. R. 820.

V. & P. Act, 1874, s. 5.

By the 5th section of the same Act it was enacted that, upon the death of a bare trustee of any corporeal or incorporeal hereditament, of which such trustee was seised in fee simple, such hereditament should vest like a chattel real in the legal personal representative from time to time of such trustee.

Land Transfer Act, 1875, s. 48.

This section was repealed by sect. 48 of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), which came into operation on the 1st January, 1876, and which was as follows:—"Section five of the Vendor and Purchaser Act, 1874, shall be repealed on and after the commencement of this Act, except as to anything duly done thereunder before the commencement of this Act; and instead thereof, be it enacted that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee."

Conveyancing Act, 1881, s. 30.

Sect. 4 of the Vendor and Purchaser Act, 1874, and sect. 48 of the Land Transfer Act, 1875, are now repealed by sect. 30 of the Conveyancing and Law of Property Act, 1881, which came into operation on the 1st January, 1882, and which enacts as follows:—Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or

Ch. XXI. s. 2.

hereditaments, corporeal or incorporeal, is vested on any trust or by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him, and for the purposes of this section the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers: Sub-sect. 1. This section, including the repeals therein, applies only in cases of death after the commencement of this Act: Sub-sect. 3.

Where trustee or mortgagee is dead.

It will be seen from the above enactments that the question, who must join in the conveyance to pass the legal estate which was vested in a deceased trustee or mortgagee, depends upon the date of his death. Thus,

1. If the trustee or mortgagee died before the 7th of August, 1874, the legal estate passed to his devisee, or otherwise to his heir-at-law (see *Re Bellis's Trusts*, 5 Ch. D. 504; Jarm. Wills, 4th ed. I. 693 *et seq.*), and such devisee or heir-at-law must still, if alive, and if the legal estate is still outstanding in him, join in the conveyance. It is to be observed that a gift in a will to the executors of securities for money, though made subject to the payment of debts, passed the legal estate in land mortgaged to the testator to them, so that they could convey without the concurrence of the heir: *Knight* v. *Robinson*, 2 K. & J. 503. And see *Ex parte Barber*, 5 Sim. 451; *Mather* v. *Thomas*, 6 Sim. 115; *Re Field*, 9 Hare, 414.

2. If the trustee (not mortgagee) died on or after the 7th August, 1874, and before the 1st January, 1876, whether testate or intestate, the legal estate passed to the legal personal represen-

tative; and he was, between those dates, the proper person to convey the legal estate. Ch. XXI. s. 2.

3. If no such dealings took place, or if the trustee (not mortgagee) died on or after the 1st January, 1876, and before the 1st January, 1882, then the legal estate went to the devisee under his will or to his legal personal representative, according as the trustee died testate or intestate; and such devisee or legal personal representative, as the case may be, must now, if alive, and if the legal estate is still outstanding in him, join in the conveyance.

4. If the mortgagee died on or after the 7th August, 1874, and before the 1st January, 1882, his legal personal representative has power to reconvey, but not to transfer. If he has not reconveyed, the legal estate remains in the devisee or heir, as the case may be, and he, if alive, and if the legal estate is still outstanding in him, must now join in the conveyance.

5. If the trustee or mortgagee died on or after the 1st January, 1882, the legal estate, irrespective of his will, vested in the legal personal representative, and he must join in the conveyance.

Bare trustee.

By trustee in the above section of the Conveyancing Act of 1881, is apparently meant a "bare trustee," whatever that may mean: see *Christie* v. *Ovington*, 1 Ch. D. 279. It does not seem to include an unpaid vendor: see sect. 4 of the same Act; *Morgan* v. *Swansea Sanitary Authority*, 9 Ch. D. 582. *Quære* also, whether it includes a trustee without a beneficial interest, but having active duties: *Ibid.*

Trustee Act, 1850.

If there is no person capable of conveying the legal estate, recourse must be had to the Trustee Act, 1850 (13 & 14 Vict. c. 60), and a vesting order obtained. In the absence of express stipulation the expense of obtaining such order must be borne by the vendor: *Bradley* v. *Munton*, 16 Beav. 294; *Ayles* v. *Cox*, 17 Beav. 584.

Order vesting copyholds.

A vesting order may be made in the case of copyholds, or a person appointed to convey under sect. 28 of the Trustee Act, 1850. See *Ayles* v. *Cox*, 17 Beav. 584; *Re Hey's Will*, 9 Hare, 221; *Paterson* v. *Paterson*, L. R. 2 Eq. 31; *Re Godfrey's Trusts*,

Ch. XXI. s. 2.

23 Ch. D. 205. As to the right of the lord to fines when a vesting order is made, see *Bristow* v. *Booth*, L. R. 5 C. P. 80.

Person appointed to convey.

Where any person neglects or refuses to comply with an order directing him to execute any conveyance, the Court may order that such conveyance shall be executed by such person as the Court may nominate for that purpose. See Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 14.

Satisfied terms.

By the Act 8 & 9 Vict. c. 112, the assignment of satisfied terms was rendered unnecessary. See, as to the meaning of and the protection afforded by an outstanding term, *Doe* v. *Price*, 16 M. & W. 603; *Doe* v. *Moulsdale*, *ibid.* 689; *Plant* v. *Taylor*, 7 H. & N. 211; *Cottrell* v. *Hughes*, 15 C. B. 532; *Doe* v. *Jones*, 13 Q. B. 774; followed in *Anderson* v. *Pignet*, L. R. 8 Ch. 180; *Freer* v. *Hesse*, 4 De G. M. & G. 495; *Shaw* v. *Johnson*, 1 Dr. & Sm. 412; *Rooper* v. *Harrison*, 2 K. & J. 86.

Necessary parties.

The vendor must also procure the concurrence of all other necessary parties, besides the person in whom the legal estate is vested. A decree of the Court that the vendor shall convey includes in effect mortgagees and all other necessary parties: *Minton* v. *Kirwood*, L. R. 3 Ch. 614.

If the contract provides that certain persons shall join in the conveyance, the vendor must procure their concurrence, and the Court will not enter into the question whether they are proper or necessary parties: *Benson* v. *Lamb*, 9 Beav. 502.

Mortgagor.

A mortgagor is not a necessary party on a sale by the mortgagee under his power, whether contained in the mortgage deed (see *Corder* v. *Morgan*, 18 Ves. 344), or given by the Conveyancing Act, 1881 (ss. 19, 21, 22).

Dower.

A woman married since the Dower Act (3 & 4 Will. IV. c. 105) came into operation, 1st January, 1834, need not join for the purpose of releasing her dower. Nor a woman married before that Act, where the property was conveyed to her husband to uses to bar dower. The Dower Act extends to dower in gavelkind lands (*Farley* v. *Bonham*, 2 J. & H. 177), but not to freebench: *Powdrell* v. *Jones*, 2 Sm. & G. 407; *Smith* v. *Adams*, 5 De G. M. & G. 712.

As to the proper persons to join in the conveyance when the vendor or purchaser dies, see Ch. XIX. s. 2, p. 273.

Sect. 3.—*Recitals.*

Seisin.

If it can properly be introduced into the conveyance, a recital that the vendor is seised for an estate of inheritance in fee simple in possession free from incumbrances is a useful one, for after twenty years the recital will become sufficient evidence of that fact: *Bolton* v. *London School Board*, 7 Ch. D. 766; and see *Fort* v. *Clarke*, 1 Russ. 601. The recital should not run "seised or otherwise well entitled," for that is no evidence that the legal estate was in the vendor: *Heath* v. *Crealock*, L. R. 10 Ch. 22; and see *Right* v. *Bucknell*, 2 B. & Ad. 278.

The recitals should not contain any reference to the sale having been by auction under particulars and conditions, for this would bring them upon the title.

Operative part controlled by recital.

Where there is a discrepancy between the recital and the operative part of a deed, the question arises which is to prevail. "Now the rule is, that a recital does not control the operative part of a deed where the operative part is clear:" per Jessel, M. R., *Dawes* v. *Tredwell*, 18 Ch. D. 354, 358; and see *Holliday* v. *Overton*, 14 Beav. 467; *Hammond* v. *Hammond*, 19 Beav. 29; *Young* v. *Smith*, L. R. 1 Eq. 180.

But this only applies to clear words of conveyance, not including general words which may be controlled by the recital: *Rooke* v. *Lord Kensington*, 2 K. & J. 753, 769. Thus the general words contained in the operative part of a conveyance may be cut down by a recital: *Jenner* v. *Jenner*, L. R. 1 Eq. 361; and see *Childers* v. *Eardley*, 28 Beav. 648. On the other hand, a recital may be corroborative evidence of a mistake whereby parcels were omitted from the operative part: *Barratt* v. *Wyatt*, 30 Beav. 442.

Estoppel by recital.

A recital to work an estoppel must be certain to every intent; "and therefore if the thing be not precisely and directly alleged, or be mere matter of supposal, it shall not be an estoppel; nor shall a man be estopped where the truth appears by the same instrument, or that the grantor had nothing to grant, or only a

Ch. XXI. s. 3.

possibility": *Right* v. *Bucknell*, 2 B. & Ad. 278, 281; and see *Wiles* v. *Woodward*, 5 Exch. 557; *Hills* v. *Laming*, 9 Exch. 256; *Heath* v. *Crealock*, L. R. 10 Ch. 22.

Mistake in recital.

A party to a deed is not estopped from controverting a recital which is untrue, and which has been introduced by mistake: *Brooke* v. *Haymes*, L. R. 6 Eq. 25; *Re Victoria, &c. Society, Empson's case*, L. R. 9 Eq. 597.

Upon whom binding.

When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument: *Stroughill* v. *Buck*, 14 Q. B. 781, 787; and see *Doe* v. *Stone*, 3 C. B. 176.

A party to a deed may be estopped from denying the truth of a recital as against a person not a party: *Forsyth* v. *Bristowe*, 8 Exch. 716.

A married woman is bound by a recital in a deed executed and acknowledged by her, as if she were a *feme sole*: *Jones* v. *Frost*, L. R. 7 Ch. 773.

But there is no authority to show that a party to the instrument would be estopped in an action by the other party, not founded on the deed and wholly collateral to it, from disputing the fact so admitted, though the recitals would certainly be evidence: *Carpenter* v. *Buller*, 8 M. & W. 209, 212; *Ex parte Morgan*, 2 Ch. D. 72; and see *Cracknall* v. *Janson*, 11 Ch. D. 1.

Incorrect recitals.

A man cannot be required to execute a deed containing incorrect recitals: *Hartley* v. *Burton*, L. R. 3 Ch. 365.

Sect. 4.—*Operative Words.*

The Act 8 & 9 Vict. c. 106, s. 2, enacts that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.

The effect of this section was not to make the use of the word "grant" necessary. But it has been, and still is, commonly used

in conveyances of real estate, and the word "assign" in conveyances of personal estate.

The word "convey" may be used if preferred. See sect. 49 of the Conveyancing Act, 1881.

By sect. 51 of the same Act it is provided that in a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words "in fee simple" without the word "heirs." Before the Act the use of the word "heirs" was absolutely necessary to create or pass an estate in fee simple. Now there are two expressions of equal effect. But one of them must be used. The grant of a freehold estate to a man and his assigns, or to a man for ever, or to a man in fee, will pass no more than a life estate: Litt. sect. 1; Co. Litt. 20*a*.

The proper way for a person to convey freeholds to himself and another is to convey them to that other to hold to the use of himself and that other. Sect. 50 of the Conveyancing Act, 1881, renders a conveyance made directly unto and to the use of himself and that other sufficiently good.

Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 21, had already enacted that any person should have power to assign personal property, by law assignable, including chattels real, directly to himself and another person, or other persons or corporation, by the like means as he might assign the same to another. There was use in this enactment, for previously personal property could not be assigned by one person to himself and another without two deeds.

Sect. 5.—*The Receipt.*

Indorsed receipt.

The vendor was formerly required to sign a receipt indorsed on the deed in addition to that contained in the body. It was still, however, open to him to show that the purchase-money had not been paid, and to establish his lien on the property for the amount. See *Coppin* v. *Coppin*, 2 P. Wms. 291; *Winter* v. *Lord Anson*, 3 Russ. 488; *Hawkins* v. *Gardiner*, 2 Sm. & G. 441; *Kettlewell* v. *Watson*, 21 Ch. D. 685; 26 Ch. D. 501.

Ch. XXI. s. 5.

Such lien, however, would not prevail against a subsequent purchaser for value without notice: *White* v. *Wakefield*, 7 Sim. 401; *Rice* v. *Rice*, 2 Drew. 73; and see *post*, pp. 317, 344.

Receipt in body or indorsed sufficient.

Now, by sects. 54 and 55 of the Conveyancing Act, 1881, a receipt either in the body of a deed or indorsed thereon is made a sufficient discharge.

Receipts of trustees.

By sect. 36 of the Conveyancing Act, 1881, it is provided that the receipt in writing of trustees shall be a sufficient discharge.

Payment to solicitor.

By sect. 56 of the same Act it is provided that where a solicitor produces a deed having in the body thereof, or indorsed thereon, a receipt for consideration money, or other consideration, the deed being executed, or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

This section abolishes the rule established by *Viney* v. *Chaplin* (2 De G. & J. 468, and approved in *Ex parte Swinbanks*, 11 Ch. D. 525), viz., that the mere fact that a solicitor is in possession of a deed executed by his client does not authorize him to receive the money for the client. The purchaser or mortgagee paying the money must have been prepared to show that the solicitor was expressly authorized by the client to receive it: *Ibid.*

The section does not apply to payment to a solicitor in cases where before the Act the client would not have been justified in authorizing his solicitor to receive the money: *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387. Such cases would be where trustees of real estate with a power to sell and give receipts sold the property: *Ibid.*; *Ghost* v. *Waller*, 9 Beav. 497; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592.

Sect. 6.—*The Parcels.*

Description of the property.

The description of the property may be either in the body of the deed or in a schedule. Reference may be made to a map or plan for further elucidation; but in such case it is important that the map should be accurate, see *Lyle* v. *Richards*, L. R. 1 H. L. 222; for unless there is a prior unambiguous description, a plan afterwards referred to will be held to explain it, the rule being "that as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it, according to the maxim *Falsa demonstratio non nocet:*" per Parke, B., *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 183, 189; and see *Davis* v. *Shepherd*, L. R. 1 Ch. 410; *Howard* v. *Earl of Shrewsbury*, L. R. 17 Eq. 378. Again, "if something clearly within the terms of the deed had been omitted from the inventory, such omission would not have prevented its passing by the deed. So, on the other hand, we cannot hold the scope of the deed to be enlarged by a mere reference to a detailed catalogue of the things which were intended to be conveyed. Even if an express intention to include articles not coming within the terms of the deed had been shown by a separate writing, that could not have made the deed operate in a way inconsistent with its plain terms, however it might lay ground for rectifying it:" per James, L. J., *Ex parte Jardine*, L. R. 10 Ch. 322, 327; and see *Barton* v. *Dawes*, 10 C. B. 261; *Harris* v. *Pepperell*, L. R. 5 Eq. 1.

Ambiguous description.

Reference to occupation.

Where the description is followed by the words "as the same is in the occupation of" someone, they will as a rule be considered to have been inserted only for the purpose of identifying the property, and not of limiting the operation of the deed: *Martyr* v. *Lawrence*, 2 De G. J. & S. 261. But if the description is itself ambiguous, these words may be used to explain it: *Dyne* v. *Nutley*, 14 C. B. 122; and see *Fox* v. *Clarke*, L. R. 9 Q. B. 565.

Minerals.

Primâ facie the owner of land is entitled to the surface itself, and all below it *ex jure naturæ: Rowbotham* v. *Wilson*, 8 H. L. C. 348. The conveyance by the owner will consequently pass

Ch. XXI. s. 6.

all minerals, unless these are specially excepted, or unless the sale is to a railway company or waterworks company. See *ante*, p. 172.

"Minerals" includes freestone: *Bell* v. *Wilson*, L. R. 1 Ch. 308; china clay: *Hext* v. *Gill*, L. R. 7 Ch. 699; brick clay: *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.*, 20 Ch. D. 552; and the word may be interpreted, according to the context, to mean anything beneath the surface: *Earl of Rosse* v. *Wainman*, 14 M. & W. 859, 2 Exch. 800; *Midland Ry. Co.* v. *Checkley*, L. R. 4 Eq. 19; *Tucker* v. *Linger*, 8 App. Cas. 508.

Soil of highway.

The presumption of law, in the absence of evidence to the contrary, is that the owner of land abutting on the highway is entitled to the soil thereof *usque ad medium filum viæ*: *Beckett* v. *Corporation of Leeds*, L. R. 7 Ch. 421, but *quære* whether this applies to towns: *Ibid.*

The grant of land, therefore, abutting on the highway will carry the right to so much of the soil, even though the property be described as bounded by the highway: *Lord* v. *Commissioners of Sydney*, 12 Moo. P. C. 473; *Berridge* v. *Ward*, 10 C. B. N. S. 400. But this does not apply to the ground intended to be used as a highway but not yet dedicated to the public: *Leigh* v. *Jack*, 5 Ex. D. 264.

Private road.

Also where land is bounded by a private road, the presumption is that the adjoining owners are entitled to the soil *usque ad medium filum*: *Holmes* v. *Bellingham*, 7 C. B. N. S. 329.

Streams.

Riparian owners are entitled to the land under a stream *usque ad medium filum aquæ*: *Bickett* v. *Morris*, L. R. 1 H. L. Sc. 47; and see *Embrey* v. *Owen*, 6 Exch. 353. As to the rights of riparian owners in a tidal river, see *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662.

Roadside strips.

Strips of land by the roadside are, in the absence of evidence to the contrary, presumed to belong to the owner of the land which adjoins the road, and not to the lord of the manor: *Steel* v. *Prickett*, 2 Stark. 463; *Grose* v. *West*, 7 Taunt. 39; *Doe* v. *Hampson*, 4 C. B. 267; *Dendy* v. *Simpson*, 18 C. B. 831. Such strips will accordingly be presumed to have passed to the purchaser of the adjoining land; but it seems that no such presumption can be made in a dispute between two parties, both

claiming by demises under the same owner of the freehold: *White* v. *Hill*, 6 Q. B. 487.

Allotments. Allotments of inclosed waste lands do not, without express words, pass with the lands in respect of which they are allotted. See *Williams* v. *Phillips*, 8 Q. B. D. 437. But if the land is sold before the allotment is made, the allotment must be made to the purchaser. See 8 & 9 Vict. c. 118, s. 84.

Hedges and ditches. Hedges and ditches are presumed both to belong to the owner of the field on the side of the hedge, on the assumption that a man making a ditch cuts it at the extremity of his own land, upon which he throws the soil for the purpose of making the hedge, see remarks of Lawrence, J., *Vowles* v. *Miller*, 3 Taunt. 137, 138. The presumption may, of course, be rebutted by evidence to the contrary, see *Searby* v. *Tottenham Ry. Co.*, L. R. 5 Eq. 409.

Way of necessity. The purchaser is entitled to a right of way to his property, and such a right is impliedly granted in every conveyance, whether the words "together with all ways appertaining" are inserted or not: *Pinnington* v. *Galland*, 9 Exch. 1; *Gayford* v. *Moffatt*, L. R. 4 Ch. 133. A way will not pass unless it is a way of necessity: *Brett* v. *Clowser*, 5 C. P. D. 376; and therefore a way which is convenient merely, but not necessary, is not granted by implication, even though the conveyance expressly includes "all ways appertaining:" *Ibid.* And the grantee is only entitled to one way of necessity, which the grantor may select: *Bolton* v. *Bolton*, 11 Ch. D. 968; unless the purchaser has been led to expect that he will be entitled to a right of way over a particular road: *Watts* v. *Kelson*, L. R. 6 Ch. 166, 172.

Grant of land together with all ways. The grant of a piece of land, "together with all ways now used or enjoyed therewith," will pass to the grantee a right of way along a clearly defined path over adjoining land of the vendor, and at the date of the grant actually used for the purposes of the land which is granted, even though the path did not exist prior to the unity of possession of the two pieces of land in the grantor: *Barkshire* v. *Grubb*, 18 Ch. D. 616; and see *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Bayley* v. *G. W. Ry. Co.*, 26 Ch. D. 434, not following *Thomson* v. *Waterlow*, L. R. 6 Eq. 36; *Langley* v. *Hammond*, L. R. 3 Ex. 161.

Ch. XXI. s. 6.

Right of way may be used for all purposes.

Where a right of way passes as appurtenant to a piece of land, the purchaser and persons claiming under him are entitled to use the road for all purposes connected with the land: *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650; and the same rule applies in favour of the vendor where a right of way is expressly or impliedly reserved as appurtenant to the land retained: *Davies* v. *Sear*, L. R. 7 Eq. 427.

A right of way which is not appurtenant to the land of the grantee is a right in gross, and does not pass to the assigns of the grantee. See *Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650, explaining *Ackroyd* v. *Smith*, 10 C. B. 164.

Continuous and apparent easements over part of land retained.

The purchaser of part of a tenement is entitled to all those continuous and apparent easements over the other part which are necessary for the enjoyment of the part granted, and have been hitherto used therewith: *Wheeldon* v. *Burrows*, 12 Ch. D. 31. Thus there will pass a right to support: *Richards* v. *Rose*, 9 Exch. 218; *Rigby* v. *Bennett*, 21 Ch. D. 559; and see *ante*, p. 214; a right to use a watercourse: *Watts* v. *Kelson*, L. R. 6 Ch. 166; a right to the use of a drain: *Pyer* v. *Carter*, 1 H. & N. 916; a right to light for existing windows: *Compton* v. *Richards*, 1 Pri. 27; *Allen* v. *Taylor*, 16 Ch. D. 355; but not for windows opened by the purchaser after the sale: *Blanchard* v. *Bridges*, 4 A. & E. 176.

But such rights in favour of the purchaser over land retained by the vendor will not be implied as extending beyond the interest of the latter in such land at the time of sale. Thus, where the vendor of a house was lessee of the adjoining land, and after the conveyance of the house, acquired the reversion on the lease, it was held that he might, after the expiration of the lease, build on the land so as to block up the windows of the house he had sold, such windows not being ancient lights: *Booth* v. *Alcock*, L. R. 8 Ch. 663.

Continuous and apparent easements over part of land sold.

The vendor selling part of a tenement will not be entitled to any apparent continuous easements over the part sold for the benefit of the part retained, unless such easements are absolutely necessary, such as a right to support or a right of way. See *Wheeldon* v. *Burrows*, 12 Ch. D. 31, dissenting on this point from *Pyer* v. *Carter*, 1 H. & N. 916. Thus the vendor cannot

prevent the purchaser from building so as to block up the windows of the house retained: *Curriers' Co.* v. *Corbett*, 2 Dr. & Sm. 355; *Ellis* v. *Manchester Carriage Co.*, 2 C. P. D. 13; *Wheeldon* v. *Burrows*, 12 Ch. D. 31. *cf. Russell v. Watts* 10 App. Ca. 590.

Land conveyed in parts by contemporaneous conveyances.

But where the house and piece of land are both sold at the same time to separate purchasers, and conveyed by contemporaneous conveyances, each purchaser being aware of the conveyance to the other, the purchaser of the adjoining land cannot block up the windows of the house: *Allen* v. *Taylor*, 16 Ch. D. 355.

Easements should be expressly granted or reserved.

Wherever the vendor intends to retain the benefit of any easements over the land sold, such rights should be expressly reserved: *Suffield* v. *Brown*, 4 De G. J. & S. 185. The Court will not imply a reservation from the conveyance, such as a reservation of a right to light to new houses, from the description of the land conveyed as bounded by building land: *Swansborough* v. *Coventry*, 9 Bing. 305.

So, wherever the purchaser has contracted for any easement not necessary for the enjoyment of the land purchased, he should see that an express grant is inserted in his conveyance, see *Barlow* v. *Rhodes*, 1 Cr. & M. 439, 448.

General words and estate clause.

Every conveyance of land made since the 1st January, 1882, passes all the appurtenances to the land, and all the estate of the grantor therein, unless otherwise provided by the deed. See sects. 6, 63 of the Conveyancing Act, 1881. It is no longer therefore necessary to insert general words or an estate clause.

Sect. 7.—*Covenants for Title.*

Covenants for title are now implied by the use of the words provided by sect. 7 of the Conveyancing Act, 1881.

In conveyances by absolute owner.

In a conveyance of freeholds by an absolute owner the usual covenants (see Form A) are impliedly given by the person conveying "as beneficial owner."

In a conveyance of leaseholds a further covenant as to the validity of the lease (see Form B) is implied by the use of those words.

Ch. XXI. s. 7.

In mortgages.

In a mortgage of freeholds absolute covenants for title (see Form C) are impliedly given by the person conveying "as beneficial owner."

In a mortgage of leaseholds a further covenant as to the validity of the lease and the payment of rent and performance of covenants (see Form D) is implied by the use of those words.

Person directing "as beneficial owner."

Where a person conveys by the direction of another "as beneficial owner," the covenants for title are impliedly given by the person so directing. See sub-sect. 2.

Covenant against incumbrances.

A covenant against incumbrances is impliedly given by any person who conveys as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition. See Form F.

Covenants by beneficiaries.

On a sale by trustees, where the persons entitled to the proceeds of sale are absolutely entitled, it has been the practice, in the absence of any stipulation to the contrary, to make them enter into covenants for title to the extent of their interests, see *Loyd* v. *Griffith*, 3 Atk. 264. Where, however, the sale is by the Court, and the trustees have power to convey and give receipts, covenants for title from the beneficiaries cannot be insisted upon: *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330. And it is usual in sales, not by the Court, to provide that the concurrence of the beneficiaries shall not be required.

Covenant by settlor.

A limited covenant for further assurance is impliedly given by any person who conveys as settlor. See Form E.

Covenants by married women.

Where a married woman, entitled to her separate use, sells land, she must convey "as beneficial owner," and give the covenants thereby implied. Where, however, she is not entitled for her separate use, and she and her husband together are selling, it seems that she should convey by the direction of her husband as beneficial owner, and he should also convey as beneficial owner. In this way covenants for title on the part of the husband only will be implied, which will be in accordance with the former practice. Sub-sect. 3 of the 7th section of the Conveyancing Act contemplates the wife and husband each conveying "as beneficial owner," thereby implying covenants on the part of each. The Act, however, does not expressly confer any right upon the purchaser to require more

than it was the practice to give before the Act, and it seems that the wife might refuse to give any covenants for title.

Covenants by tenant for life.

Where property is sold by a tenant for life, or by trustees with his consent, he must enter into covenants for title, whether his estate be legal or equitable: *Re London Bridge Acts*, 13 Sim. 176; *Earl Poulett* v. *Hood*, L. R. 5 Eq. 115; *Re Sawyer & Baring's Contract*, 33 W. R. 26. The covenants on his part may be limited by providing that so far as regards the remainder expectant on his life estate, the covenants shall not extend to the acts, deeds, or defaults of any person other than himself and persons claiming under him. See Dart's V. & P. 548, 5th ed.

Conveyance of copyholds.

The covenants for title implied under the Conveyancing Act are not intended to apply, or, at any rate, are not appropriate to a covenant to surrender copyholds. In this case, the covenant should be to the effect that the vendor has good right to surrender. The implied covenant is to the effect that the vendor has good right to convey; and even if, which seems doubtful, the interpretation clause (sect. 2, v.) extends to the implied covenants, it would only make covenant mean that he has good right to covenant to surrender. It seems, therefore, that in deeds covenanting to surrender copyholds, the old covenants for title should properly be inserted as before the Act.

Deeds conferring the right to admittance.

In a deed conferring the right to admittance to copyhold or customary land, but not including a demise by way of lease at a rent, or any customary assurance other than a deed conferring the right to admittance, covenants for title may be implied under sect. 7. See sub-sect. 5.

No surrender is necessary upon a deed conferring the right to admittance to copyholds, such as a bargain and sale by trustees of a will, an appointment by the trustee of a bankrupt under sect. 50, sub-sect. 4, of the Bankruptcy Act, 1883, a conveyance by a person appointed to convey under sect. 28 of the Trustee Act, 1850, or by a tenant for life under the Settled Land Act, 1882. After the execution the purchaser has a right to be admitted forthwith. The covenants implied under the Conveyancing Act are accordingly sufficiently appropriate. A covenant to surrender, on the other hand, confers no right to

Ch. XXI. s. 7.

admittance, but requires to be followed by a surrender before the purchaser can claim to be admitted.

Sect. 8.—*Execution.*

Signing.

The deed must be executed by all parties to be bound by it. Execution means sealing and delivery. Whether signing is absolutely necessary is a matter of doubt, but in practice it is always required: see Williams' Real Property, 158, 14th ed.

Sealing.

The sealing may be done by another person previous to execution by the party; and if he then delivers it as his deed, this is sufficient allowance by him of the seal, and so a good deed: Shep. Touch. 57; and see *Ball* v. *Dunsterville*, 4 T. R. 313.

Delivery.

A deed is delivered by the party declaring that he delivers it as his act and deed, and putting his finger at the same time on the seal, although he retains the deed in his possession: *Xenos* v. *Wickham*, L. R. 2 H. L. 296; *Doe* v. *Knight*, 5 B. & C. 671. Delivery to a third person for the use of the party in whose favour the deed is executed is sufficient delivery: *Ibid.*; or delivery to the attorney of the party executing, who afterwards delivers it to the party in whose favour it is executed: *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119. See also *Hall* v. *Enderby*, 12 Q. B. 699.

Time of taking effect.

The deed will take effect from the moment of delivery: *Doe* v. *Knight*, 5 B. & C. 671; *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119, even though not communicated to the person in whose favour it is made: *Exton* v. *Scott*, 6 Sim. 31; *Fletcher* v. *Fletcher*, 4 Hare, 67.

Escrow.

If it be delivered as an escrow, and afterwards, on the performance of the condition, be delivered to the party in whose favour it is made, it takes effect as from the time of its execution: Williams' Real Property, 155; and see *Bowker* v. *Burdekin*, 11 M. & W. 128, 147; *Nash* v. *Flyn*, 1 J. & Lat. 162, 175.

Order of deeds.

"When two deeds are executed on the same day, the Court must inquire which was in fact executed first; but if there is

anything in the deeds themselves to show an intention either that they shall take effect *pari passu*, or even that the later deed shall take effect in priority to the earlier, in that case the Court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties:" per Fry, J.; *Gartside* v. *Silkstone Coal and Iron Co.*, 21 Ch. D. 762, 767.

Attestation.

The execution is usually attested by two witnesses, though the deed would not be void even without any. See Williams' Real Property, 201; *Seal* v. *Claridge*, 7 Q. B. D. 516, 519; unless the deed is one requiring special attestation, as to which, see 22 & 23 Vict. c. 35, s. 12, *ante*, p. 196.

Conveyancing Act, 1881 s. 8.

In the case of *Viney* v. *Chaplin* (2 De G. & J. 468), it was laid down that a purchaser had a right to see the execution of the conveyance attested by a witness of his own, and to be present. See also *Essex* v. *Daniell*, L. R. 10 C. P. 538. This has now been altered by the 8th section of the Conveyancing Act, 1881, which provides that, on a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor as such; but he shall be entitled to have at his own cost the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

Execution by attorney.

Previously to the commencement of the Conveyancing Act, 1881, it was necessary for an attorney to execute in the name of his principal and not in his own name: *Wilks* v. *Back*, 2 East, 142.

Conveyancing Act, 1881, s. 46.

Now, by sect. 46 of that Act, which applies to powers given before as well as after the Act, it is provided that the donee of a power of attorney may execute any assurance with his own name and signature and his own seal.

The 8th section of the Conveyancing Act, 1882, renders everything done under a power of attorney, given for valuable consideration and expressed to be irrevocable, valid in favour of a purchaser; and the 9th section renders everything done under a power of attorney, expressed to be irrevocable for any fixed time therein specified, not exceeding one year, whether given for valuable consideration or not, valid in favour of a purchaser.

Ch. XXI. s. 8. These enactments modify the old law under which powers of attorney were absolutely revoked by the death of the donor: see *Watson* v. *King*, 4 Camp. 272; *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229.

Execution by committee. The committee of a lunatic should execute the deed in the name and with the seal of the lunatic, but he should sign his own name. It is sufficient if the testimonium clause is in the usual form and the deed be executed by the committee: see *Lawrie* v. *Lees*, 7 App. Cas. 19.

Sect. 9.—*Acknowledgment by Married Woman.*

If the deed purports to deal with the real estate of a married woman to which she is not entitled for her separate use, her husband must concur, and the deed must be acknowledged by her under sect. 79 of the Fines and Recoveries Act (3 & 4 Will. IV. c. 74), and sect. 7 of the Conveyancing Act, 1882. If she is entitled for her separate use, otherwise than under the Married Women's Property Act, 1882, then, if she is not restrained from alienation, she can dispose of her equitable interest, as if she were a *feme sole*, without the concurrence of her husband and without acknowledgment: *Taylor* v. *Meads*, 4 De G. J. & S. 597. But, in order to pass the legal estate, unless it is outstanding in trustees for her who can in that event convey it as she directs, her husband must join and the deed must be acknowledged by her: see Dav. Conv. II. 196; and judgment of Lord Selborne, L. C., *Cahill* v. *Cahill*, 8 App. Cas. 420.

By sect. 2 of the Married Women's Property Act, 1882, it is enacted that every woman who marries after the commencement of this Act (*i. e.*, the 1st of January, 1883) shall be entitled to have and to hold as her separate property, and to dispose of by will or otherwise, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage. And by sect. 5 it is enacted that every woman married before the commencement of this Act shall be entitled to have and to hold, and to dispose of by will or otherwise as her separate property, all real and personal pro-

perty, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act.

Therefore in no case will a woman married on or after the 1st of January, 1883, have to acknowledge the deed. A woman married before that day will only have to acknowledge the deed in order that it may pass the legal estate in realty acquired before that day.

Sect. 10.—*Inrolment.*

Mortmain Act.

Under the Mortmain Act (9 Geo. II. c. 36), s. 1, all conveyances of lands for charitable purposes not being for valuable consideration must be by deed executed twelve months before the death of the donor, and inrolled within six months from execution.

A deed so inrolled is, when the grantee has survived twelve months after the date of the conveyance, good and effectual from the day of execution: *Trye* v. *The Corporation of Gloucester*, 14 Beav. 173.

Barring of estate tail.

The Fines and Recoveries Act (3 & 4 Will. IV. c. 74), requires for the barring of an estate tail in freeholds the consent of the protector, if any, to create a larger estate than a base fee, sect. 34; the disposition to be by deed, and if by a married woman with her husband's concurrence, and acknowledged by her, sect. 40; the deed to be inrolled within six months, sect. 41; and if the protector's consent be given by a separate deed, such deed to be inrolled with or before the disentailing assurance, sect. 46.

For the barring of an estate tail in copyholds (if such exists according to the custom of the manor, see *Doe* v. *Truby*, 2 W. Bl. 944) the Fines and Recoveries Act requires, if the estate be legal, a surrender, sect. 50; if the estate be equitable, either a surrender or a deed entered on the Court rolls of the manor, sects. 50, 53. The deed by which the protector's consent is given must in like manner be entered either at or before the surrender, sect. 51; or his consent, if not by deed, must be given to the person taking the surrender, and entered on the rolls under sect. 52.

Chap. XXI. s. 10.

Where copyholds of a manor, in which no custom exists to entail, are limited to a man and the heirs of his body, such limitation creates a fee simple conditional at common law: *Doe* v. *Clark*, 5 B. & Ald. 458.

Sect. 11.—*Production of Deeds.*

Covenant for production.

It was formerly held that a purchaser was not bound to complete without the title deeds, unless he got a legal covenant for their production, *i. e.*, a covenant which runs with the land (*Barclay* v. *Raine*, 1 Sim. & St. 449; and see *Fain* v. *Ayers*, 2 Sim. & St. 533); but by sect. 2, sub-sect. 3, of the Vendor and Purchaser Act, 1874, an equitable right to production of documents is made sufficient; and by sub-sect. 4 covenants for production are to be furnished at the expense of the purchaser, and perused and executed by the vendor and necessary parties other than the purchaser at the vendor's expense.

Acknowledgment and undertaking.

By the Conveyancing Act, 1881, sect. 9, it is provided that where a person retains possession of documents, and gives to another an acknowledgment in writing of the right to production of those documents, and to delivery of copies, that acknowledgment shall have an effect equivalent to the covenant for production and delivery of copies which was formerly in use. See sub-sects. 2—8. Where the person retaining possession of documents gives to another an undertaking for safe custody thereof, it shall impose upon him an obligation to keep the documents safe. See sub-sects. 9—11.

The acknowledgment and undertaking are equivalent to the covenant for production and for safe custody formerly given. They need not be by deed, but must be in writing. The usual practice is to insert them in the conveyance itself, but this should not be done if it is desired to keep any of the documents off the title.

The obligations imposed by this section bind the person having possession or control of the documents from time to time, but so

long only as he has possession or control of them. See sub-sects. 2, 9.

Absolute owner and trustees.

An absolute owner, who is selling, gives both the acknowledgment and the undertaking. Trustees and mortgagees give the acknowledgment, but not the undertaking, see *Onslow* v. *Lord Londesborough*, 10 Hare, 67; Dav. Conv. Vol. II. 657, 4th ed.

Mortgagees.

Mortgagees could not, as a rule, be compelled to produce their title deeds until they were paid off, see *Greenwood* v. *Rothwell*, 7 Beav. 291; *Langstaff* v. *Nicholson*, 25 Beav. 160, Sug. V. & P. 445; unless they were consenting to a sale by the Court: *Livesey* v. *Harding*, 1 Beav. 343. See now, however, Conveyancing Act, 1881, s. 16, as to mortgages made after the commencement of the Act.

It is to be observed that the acknowledgment and undertaking under sect. 9 of the Conveyancing Act can only be given by a person who retains the deeds. If, therefore, part of an estate in mortgage is being sold, the mortgagees can give the acknowledgment, but the mortgagor cannot, in lieu of the covenant for safe custody, give the undertaking. It seems, therefore, that he must give the covenant to that effect in the same manner as prevailed before the Conveyancing Act.

Tenant for life entitled to custody.

The legal tenant for life of freeholds is entitled to the custody of the title deeds: *Garner* v. *Hannyngton*, 22 Beav. 627; *Allwood* v. *Heywood*, 1 H. & C. 745; *Leathes* v. *Leathes*, 5 Ch. D. 221; and see *Ex parte Rogers*, 26 Ch. D. 31; unless he has been guilty of misconduct with respect to them: *Jenner* v. *Morris*, L. R. 1 Ch. 603; or there is a pending suit: *Stanford* v. *Roberts*, L. R. 6 Ch. 307; or they have been impounded by the Court for safe custody: *Ford* v. *Peering*, 1 Ves. jun. 72. If the tenant for life is only equitably entitled, it seems that if he has got the deeds he may keep them, but that if the trustees have got them they may keep them, see *Taylor* v. *Sparrow*, 4 Giff. 703; *Lady Langdale* v. *Briggs*, 8 De G. M. & G. 391, 416. If the tenant for life has the deeds he must give the acknowledgment and undertaking under sect. 9 of the Conveyancing Act.

Attested copies.

Where the purchaser does not get deeds he is entitled to have attested copies. Formerly the expense of these was payable by

Chap. XXI. s. 11.

the vendor in the absence of express stipulation: *Boughton* v. *Jewell*, 15 Ves. 176; *Cotton* v. *Scudamore*, 1 K. & J. 321. But now, by the Conveyancing Act, 1881, s. 3, sub-s. 6, the expense is thrown on the purchaser.

A person having a right to production of documents has also a right to take copies of them: *Pratt* v. *Pratt*, 30 W. R. 837.

CHAPTER XXII.

STAMPS.

SECT.		PAGE
1.	*The duties*	305
2.	*What instruments must be stamped*	307
3.	*Stamping after execution*	309

SECT. 1.—*The Duties.*

BY the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 3, the instruments specified in the schedule are charged with the duties therein specified. Under this Act the following duties are payable:—

Agreements. For an agreement relating to a matter of 5*l.* or more (except agreements for leases), 6*d.*

Conveyances. For a conveyance, at the rate of 5*s.* for every 50*l.*; but where the purchase-money is not more than 300*l.*, at the rate of 2*s.* 6*d.* for every 25*l.*; or where the purchase-money is not more than 25*l.*, at the rate of 6*d.* for every 5*l.*

Common deeds. For any deed not carrying an *ad valorem* stamp, 10*s.*

Mortgages. For a mortgage, at the rate of 2*s.* 6*d.* for every 100*l.*; but where the mortgage money is not more than 300*l.*, at the rate of 1*s.* 3*d.* for every 50*l.*; or where the mortgage money is not more than 25*l.*, 8*d.*; or not more than 10*l.*, 3*d.*, see 46 & 47 Vict. c. 55, s. 15. For every further advance, the same duty as on a mortgage: Sect. 107; and see *Wale* v. *Commissioners of Inland Revenue*, 4 Ex. D. 270. For a transfer or reconveyance of a mortgage, at the rate of 6*d.* for every 100*l.*

Leases. For a lease for any term not exceeding 35 years, at the rate of 5*s.* for every 50*l.* of rent; but where the rent does not exceed 100*l.*, at the rate of 2*s.* 6*d.* for every 25*l.*; or where the rent does not exceed 25*l.*, at the rate of 6*d.* for every 5*l.* For any

Ch. XXII. s. 1.

term exceeding 35 years, but not exceeding 100 years, the rate is six times as great. For any term exceeding 100 years the rate is twelve times as great. Leases for less than a year at a rent not exceeding 10*l.*, and of furnished houses at a rent exceeding 25*l.*, carry a smaller stamp.

Agreements for leases.

An agreement for a lease at a rent not exceeding 5*l.* carries a 6*d.* stamp; above that rent it must be stamped as a lease, and then a lease subsequently made in conformity with it is chargeable with a 6*d.* stamp only.

Former Acts.

In the examination of abstracts it is sometimes necessary to refer to the Stamp Acts from time to time in force. These are 55 Geo. III. c. 184, from and after the 31st August, 1815; 13 & 14 Vict. c. 97, from and after the 10th October, 1850; and the present Act (33 & 34 Vict. c. 97), from the 1st January, 1871. The vendor usually provides by his conditions of sale that any unstamped or insufficiently-stamped documents shall be stamped at the expense of the purchaser, if he requires it to be done. In the absence of such a condition the expense of stamping falls on the vendor, see *post*, p. 309.

Consideration to be fully stated.

By section 10 of the Act of 1870 all facts and circumstances affecting the liability of any instrument to *ad valorem* duty are to be fully set forth therein. Any person making default under this section is liable to forfeit 10*l.*

The parties are at liberty to reduce the consideration so as to bring the deed within a lower scale of duty: *Shepherd* v. *Hall*, 3 Camp. 180.

Sections 71—73, 75 state how the duty is to be calculated where the consideration consists wholly or in part of stock, periodical payments or annuities, or a debt; and see *Gingell* v. *Purkins*, 4 Exch. 720; *Limmer Asphalte Co.* v. *Commissioners of I. R.*, L. R. 7 Ex. 211.

Sale subject to mortgage

When property is sold subject to a mortgage, the amount owing is to be deemed part of the consideration, and *ad valorem* duty is payable in respect of it. See sect. 73.

SECT. 2.—*What Instruments must be stamped.*

Conveyance and mortgage.

An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters: Sect. 8, sub-sect. 1. Therefore a transaction combining a conveyance and a mortgage is liable to separate duties.

Receipt indorsed.

The receipt indorsed on a deed duly stamped is exempted from duty. See Sched. Receipt, Exemption 11.

What is a conveyance on sale.

A deed assigning the goodwill of a business is liable to *ad valorem* duty as a conveyance on sale: *Potter* v. *Commissioners of I. R.*, 10 Exch. 147. So is a conveyance by a retiring partner to his co-partner: *Christie* v. *Commissioners of I. R.*, L. R. 2 Ex. 46; *Phillips* v. *Commissioners of I. R.*, *ibid.* 399; and in fact any instrument which operates as a record of the transfer of property: *Horsfall* v. *Hey*, 2 Exch. 778.

But a transaction which is nothing more than a family arrangement, even though it involves a payment of money, is not a conveyance liable to duty: *Denn* v. *Diamond*, 4 B. & C. 243; and see *Massy* v. *Nanney*, 3 Bing. N. C. 478.

Exchange and partition.

Where upon the exchange or partition of any real property any consideration exceeding 100*l.* is given for equality, the principal instrument is to be charged with *ad valorem* duty as a conveyance on sale for such consideration. See sect. 94.

Settlements.

Settlements of real estate are only subject to the ordinary deed stamp of 10*s.*, but settlements of money or stock are liable to a duty of 5*s.* for every 100*l.* or fraction of the amount settled. See Sched. Settlement.

An order of the Court making a settlement must bear the usual settlement stamp: *Re Gowan*, 17 Ch. D. 778.

Vesting orders.

The term "conveyance on sale" includes every decree or order of any court or of any commissioners whereby any property upon the sale thereof is transferred to or vested in the purchaser. See sect. 70.

Every such decree or order, except on the occasion of a sale or mortgage, is chargeable with duty as a conveyance or transfer of property. But a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any

Ch. XXII. s. 2.

higher duty than ten shillings: Sect. 78. A vesting order, however, made on the appointment of new trustees must bear an additional stamp: *Hadgett* v. *Commissioners of I. R.*, 3 Ex. D. 46.

Building societies.

By the Building Societies Act, 1874 (37 & 38 Vict. c. 42), sect. 41, it is enacted that no instrument or document made in pursuance of the Act or of the rules of the society shall be liable to any stamp duty, but the exemption does not extend to any mortgage, except a mortgage by a member for securing a sum not exceeding 500*l.* As to the law previous to the Act, see *Thorn* v. *Croft*, L. R. 3 Eq. 193; *Re Royal Liver Friendly Society*, L. R. 5 Ex. 78; and Stamp Act, 1870, sect. 112.

Bankrupts.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 144, every deed relating solely to any interest in any real or personal property which is part of the estate of a bankrupt, and which after the execution of the deed is or remains the estate of the bankrupt or of the trustee under the bankruptcy, is exempted from stamp duty, except in respect of fees under the Act.

Apportionment.

Where property has been sold for one sum, but is conveyed in separate parcels by different instruments, the consideration must be apportioned. See sect. 74, sub-sects. 1, 2.

Sub-sale.

On a sale to a sub-purchaser before conveyance, the conveyance to such sub-purchaser is charged with duty on the consideration paid by him. See sect. 74, sub-sects. 3, 4, 5; *Att.-Gen.* v. *Brown*, 3 Exch. 662.

Several instruments.

Where there are several instruments of conveyance, the principal only is to be charged with *ad valorem* duty. See ss. 76, 77. A mere deed of confirmation to correct an informality or invalidity in a conveyance properly stamped, is not liable to *ad valorem* duty, even though it contains operative words of conveyance: *Doe* v. *Weston*, 2 Q. B. 249.

Where several persons join to convey their separate interests by one deed, one *ad valorem* stamp is sufficient: *Wills* v. *Bridge*, 4 Exch. 193; *Doe* v. *Tilbury*, 14 C. B. 304. Where, however, as on a conveyance of copyholds, separate admittances in respect of distinct interests are required, they will need distinct stamps: *Reg.* v. *Eton College*, 8 Q. B. 527.

Land Transfer Act, 1875.

Under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87),

sect. 83 (7), the registrar is to ascertain that all stamp duties have been satisfied. Ch. XXII. s. 2.

Sect. 3.—*Stamping after Execution.*

An unstamped or insufficiently stamped instrument may be stamped after execution on payment of the unpaid duty and a penalty of 10*l.*, and also by way of further penalty, when the unpaid duty exceeds 10*l.*, of interest on such duty at the rate of 5*l.* per cent. per annum from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty. See sect. 15. Penalties.

But an instrument executed out of the United Kingdom may be stamped within two months after being first received in the United Kingdom on payment of duty only.

The Commissioners may remit the penalties within twelve months after the first execution.

A deed must be stamped according to the law in force at the time of its execution: *Clarke* v. *Roche*, 3 Q. B. D. 170. Insufficient stamp.

A deed which, after execution by a vendor, is altered into a conveyance direct to a sub-purchaser requires a new stamp: *London & Brighton Ry. Co.* v. *Fairclough*, 2 Man. & Gr. 674. But a mere mistake may be corrected after execution: *Ibid.* p. 705. A slight alteration while the deed is *in fieri*, or partially executed, does not render it liable to a fresh stamp: *Jones* v. *Jones*, 1 Cr. & M. 721. Alterations after execution.

A purchaser is entitled to have every deed forming a step in his title in such a shape that he can, if he needs, give it in evidence. Therefore he can require a mortgage deed bearing only a 10*s.* stamp to be sufficiently stamped, even though the mortgagee is joining in the conveyance: *Whiting to Loomes*, 17 Ch. D. 10; and see *Ex parte Birkbeck Land Society*, 24 Ch. D. 119. Such stamping must be at the vendor's expense, unless there is a condition of sale throwing it on the purchaser: *Smith* v. *Wyley*, 16 Jur. 1136. Purchaser entitled to have title deeds properly stamped.

Ch. XXII. s. 3.

Evidence.

An unstamped or insufficiently stamped deed, when produced in any court of civil judicature, may, on payment of duty, penalty, and a further sum of 1*l.*, be received in evidence. See sect. 16.

Otherwise no instrument shall, except in criminal proceedings, be given in evidence. See sect. 17.

The Court will not decide any point raised upon instruments which it knows to be insufficiently stamped, even though the documents are set forth in a special case and the parties agree to argue the question as though they were properly stamped: *Nixon* v. *Albion Co.*, L. R. 2 Ex. 338.

CHAPTER XXIII.

NOTICE.

SECT.		PAGE
1.	*The doctrine of notice*	311
	i. *Grounds of doctrine*	311
	ii. *Purchaser without notice may sell to person with notice*	312
	iii. *Conveyancing Act*, 1882, *s.* 3	312
2.	*Actual notice*	313
3.	*Constructive notice*	314
	i. *Definition of*	314
	ii. *From contents of documents*	314
	iii. *From absence of title deeds*	317
4.	*Notice through an agent*	321
	i. *Actual to agent is actual to principal*	321
	ii. *Where same solicitor employed by both parties*	323
	iii. *Presumption rebutted by fraud of solicitor*	324
5.	*Notice in register county*	325
	i. *In Middlesex*	325
	ii. *In Yorkshire*	326
	iii. *Registration of memorandum of deposit*	328
	iv. *Equitable mortgage without memorandum*	329
	v. *Registration of wills*	330

SECT. 1.—*The Doctrine of Notice.*

Grounds of the doctrine.

THE grounds on which a person who purchases with notice of a prior claim is held to take subject to such claim are thus expressed by Lord Hardwicke in the case of *Le Neve* v. *Le Neve*, Amb. 436—"The taking of a legal estate after notice of a prior right makes a person a *malâ fide* purchaser. . . . . Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum.* It is a maxim, too, in our law, that *fraus et dolus nemini patrocinari debent.* Fraud, or *mala fides*, is therefore the true ground on which the Court is governed in the cases of notice." See also *Ware* v. *Lord Egmont*, 4 De G. M. & G. 460, and judgment of Fry, J., in *Kettlewell* v. *Watson*, 21 Ch. D. 685, 705; 26 Ch. D. 501.

The result is the same, whatever the prior claim may be,

Chap. XXIII. s. 1.

whether under a marriage settlement, as in *Le Neve* v. *Le Neve*, or a lien for unpaid purchase-money, as in *Mackreth* v. *Symmons* (15 Ves. 329), or any other equitable claim.

Same result from actual and constructive notice.

Nor does it make any difference in the consequences whether the notice is actual or constructive: *Sheldon* v. *Cox*, Amb. 626; *Prosser* v. *Rice*, 28 Beav. 68, 74; except in Middlesex, as to which, see p. 327.

Purchaser without notice may sell to person who has notice,

Where a person purchases for valuable consideration without notice of a prior incumbrance, and then sells to another who has notice, such latter purchaser will not be affected with the notice, but may shelter himself under the first purchaser: *Brandlyn* v. *Ord*, 1 Atk. 571; *Lowther* v. *Carlton*, 2 Atk. 241; *Sweet* v. *Southcote*, 2 Bro. C. C. 66; *M'Queen* v. *Farquhar*, 11 Ves. 467, 478. And also where the first purchaser has notice and sells to a second purchaser who has no notice, who again sells to a third purchaser who has notice, such last purchaser will not be affected by the notice: *Harrison* v. *Forth*, 1 Eq. Cas. Ab. 331, pl. 6; "for otherwise an innocent purchaser without notice must be forced to keep the estate, and cannot sell it." This, however, only applies where the purchaser has acquired the legal estate, for persons taking an equitable security take it subject to all the equities which affect it: *Ford* v. *White*, 16 Beav. 120, 124.

unless the interests are equitable.

Date of notice.

Notice is effectual if given before payment of the purchase-money: *More* v. *Mayhow*, 1 Ch. Cas. 34; *Jones* v. *Stanley*, 2 Eq. Cas. Ab. 685, pl. 9; *Tourville* v. *Naish*, 3 P. Wms. 307; *Story* v. *Windsor*, 2 Atk. 630. It has even been held to be effectual where given after payment of the purchase-money, but before conveyance: *Wigg* v. *Wigg*, 1 Atk. 382, 384; and see *Tildesley* v. *Lodge*, 3 Sm. & G. 543; *Sharpe* v. *Foy*, L. R. 4 Ch. 35.

Conveyancing Act, 1882, s. 3.

By the Conveyancing Act, 1882, s. 3, the law on the subject of notice has been codified. That section is chiefly, if not altogether declaratory of the law as it previously existed, and is in the following terms:—

A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—

(1.) It is within his own knowledge, or would have come

to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(2.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Sect. 2.—*Actual Notice.*

Notice must be in same transaction.

With regard to actual notice Lord St. Leonards in his Vendors and Purchasers, p. 755, says that the notice to the purchaser must be in the same transaction (and see *Hamilton* v. *Royse*, 2 Sch. & L. 315, 327); and that he is not bound to attend to vague rumours, or to statements by mere strangers, and that a notice, in order to be binding, must proceed from some person interested in the property. See *Wildgoose* v. *Wayland*, Gould, 147; *Butcher* v. *Stapely*, 1 Vern. 363; *Fry* v. *Porter*, 1 Mod. 300; *Jolland* v. *Stainbridge*, 3 Ves. 478; *Barnhart* v. *Greenshields*, 2 Eq. R. 1227, 9 Moo. P. C. 18. This statement of the law may perhaps require some qualification, see Dart's V. & P. 859; *Taylor* v. *Baker*, 5 Pri. 306.

Witness to a deed.

The mere attesting the execution of an instrument does not give the attesting witness notice of its contents, see *Small* v. *Currie*, 2 Drew. 102, 115; 5 De G. M. & G. 141.

Further advances made to vendor after sale.

Where a purchaser has notice of a charge on land, and of the amount owing, he is not affected by further advances made to the vendor after the incumbrancer had notice of the sale. Thus, where title deeds had been deposited with a bank to secure the current account of the vendor who contracted to sell the land, and subsequently paid in to his account sums sufficient (according to the principle in *Clayton's Case*, 1 Mer. 585) to discharge the debt due on the balance at the time of the contract for sale,

Chap. XXIII. s. 2.

but the bank had, after notice of the contract, made fresh advances to the vendor, it was held that there was no charge on the land as against the purchaser for such fresh advances: *London and County Banking Co.* v. *Ratcliffe*, 6 App. Cas. 722. In this case Lord Blackburn laid it down, p. 739, that a purchaser, with notice that the title deeds have been deposited with a bank, is not bound to inquire whether the bank has, after receiving notice of the purchase, made fresh advances on the security of the unpaid vendor's lien; but that it lies on the bank to give notice to the purchaser that it has done so.

Acts of Parliament.

A public Act of Parliament is notice to everyone, even though local: *Barraud* v. *Archer*, 2 Sim. 433. A private Act is not notice: *Pomfret* v. *Lord Windsor*, 2 Ves. sen. 472, 480; *Ballard* v. *Way*, 1 M. & W. 520.

Sect. 3.—*Constructive Notice.*

Meaning.

Constructive notice was said by Eyre, C. B., in *Plumb* v. *Fluitt*, 2 Anst. 432, 438, to be "in its nature no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted."

This is not altogether a satisfactory definition, because the idea of constructive notice altogether excludes that of actual notice: thus, Lord Cottenham, in *Wilde* v. *Gibson*, 1 H. L. C. 624, says, "If there be knowledge, the case of constructive notice cannot arise; it would be absorbed in the proof of knowledge."

Constructive notice from contents of documents.

Constructive notice may arise from the documents of title. In *Moore* v. *Bennett* (2 Ch. Cas. 246, cited in *Coppin* v. *Fernyhough*, 2 Bro. C. C. 297), it is laid down, that "in all cases where the purchaser cannot make out a title but by a deed which leads him to another fact, he shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for it is *crassa negligentia* that he sought not after it; see also *Tanner* v. *Florence*, 1 Ch. Cas. 259. In *Bisco* v. *Earl of Banbury* (1 Ch. Cas. 291), it is laid down that the purchaser having notice of a mortgage deed ought to have seen it, and

that would have led him to the other deeds, in which, pursued from one to another, the whole case must have been discovered to him. This rule of law is thus stated in *Neesom* v. *Clarkson* (2 Hare, 163, 173): "Wherever you find one deed referred to by another, the person who claims under the deed referred to is bound at his peril to ascertain the contents of that deed." See also *Malpas* v. *Ackland*, 3 Russ. 273; *Davies* v. *Thomas*, 2 Y. & C. Ex. 234; *Eland* v. *Eland*, 1 Beav. 235; *Att.-Gen.* v. *Flint*, 4 Hare, 147.

Notice extends to whole deed, though inaccurately recited.

Notice of a deed is notice of the whole of its contents: *Hamilton* v. *Royse*, 2 Sch. & L. 315. And the purchaser has notice of the real contents of a document, even though they are inaccurately recited: *Hope* v. *Liddell*, 21 Beav. 183.

Post-nuptial settlement notice of ante-nuptial articles.

The case which has gone farthest in this direction is *Ferrars* v. *Cherry* (2 Vern. 383), in which it was held that a post-nuptial settlement was notice of articles made before marriage, but not mentioned or referred to in the settlement. There seems to be some doubt, however, whether this case is quite accurately reported, see note 4 at page 385, and remarks of Lord Hardwicke in *Senhouse* v. *Earle*, Amb. 289.

Notice of true construction.

Where the purchaser has notice of articles, he is considered affected with notice of their true construction: *Davies* v. *Davies*, 4 Beav. 54. But where their meaning is ambiguous, they will not be enforced as against a purchaser, at any rate, after a long lapse of time: *Thompson* v. *Simpson*, 1 Dru. & War. 459, 491.

In the case of *Penny* v. *Watts* (1 Mac. & G. 150), a purchaser was held affected with notice of an agreement subsequent to certain transactions of which he had notice, which agreement he might have heard of if he had pushed his inquiries very vigorously. This case, however, is considered to have gone too far, see Sug. V. & P. 766; *Abbott* v. *Geraghty*, 4 Ir. Ch. R. 15, 23.

Notice of interests of parties to deed.

A purchaser may be affected with notice of the interests of persons from their joining in a deed, *e. g.* as devisees: *Burgoyne* v. *Hatton*, Barn. Ch. R. 237; as a married woman: *Steedman* v. *Poole*, 6 Hare, 193; as trustees of a charity: *Att.-Gen.* v. *Hall*, 16 Beav. 388; as tenant for life: *Nixon* v. *Robinson*, 2 J. & Lat. 4; *Roddy* v. *Williams*, 3 J. & Lat. 1.

Chap. XXIII. s. 3.

Notice of a lease is notice of its covenants: *Taylor* v. *Stibbert*, 2 Ves. jun. 437; *Pope* v. *Garland*, 4 Y. & C. Ex. 394.

Covenants in lease.

Lease by charity trustees.

The purchaser of a lease granted by the trustees of a charity will be fixed with notice of who the lessors were, but not necessarily that the lease was bad: *Att.-Gen.* v. *Backhouse*, 17 Ves. 293. But if the facts of the lease are sufficient to show its equitable invalidity, the purchaser takes with notice: *Att.-Gen.* v. *Pargeter*, 6 Beav. 150; *Att.-Gen.* v. *Pilgrim*, 12 Beav. 57; see also *Magdalen College Hospital* v. *Knotts*, 4 App. Cas. 324.

Incumbrances.

So a purchaser will be held to have had notice of charges and incumbrances mentioned in a deed of which he had notice: *Mertins* v. *Jolliffe*, Amb. 311. In fact, a recital or statement that the property is subject to incumbrances generally, without stating particulars, is sufficient, if the purchaser does not make proper inquiries as to what the incumbrances are: *Farrow* v. *Rees*, 4 Beav. 18; *Jones* v. *Williams*, 24 Beav. 47; and see *Taylor* v. *Baker*, 5 Pri. 306; *Gibson* v. *Ingo*, 6 Hare, 112, 124.

Kennedy v. *Green*.

A person having notice of a deed is affected with notice of all circumstances which are apparent on the face of the deed, and which would excite the suspicions of a professional man, and have led to inquiry: *Kennedy* v. *Green*, 3 My. & K. 699, in which case the receipt was in an unusual place, low down on the back of the deed, with the signature just below a fold, so that the person signing might not have seen to what her signature was attached. This doctrine must be administered with care: *Greenslade* v. *Dare*, 20 Beav. 284, where it was held that the absence of a receipt, though notice of non-payment, is not notice of other irregularities. See also *Hunter* v. *Walters*, L. R. 7 Ch. 75.

Draft of deed no notice.

A purchaser is not affected by notice merely of a draft or of a deed in contemplation: *Cothay* v. *Sydenham*, 2 Bro. C. C. 391; and see *Williams* v. *Williams*, 17 Ch. D. 437.

Deeds and facts not connected with title.

A purchaser will not be presumed to have investigated instruments which are neither directly nor presumptively connected with the title to the property: *West* v. *Reid*, 2 Hare, 249; nor will he be fixed with constructive notice of circumstances entirely collateral to any question of title, such as negligence on the part of a trustee conducting a sale: *Borell* v. *Dann*, 2 Hare, 440.

It has been laid down by Lord Hatherley, L. C., in *Hunter* v. *Walters* (L. R. 7 Ch. 75, 83), that if a man who is purchasing or taking a mortgage over a large estate, chooses to be content with a short title as to a small portion, then as to all the rest of the estate he is not to be affected with notice of something which he might have found out if he had investigated the earlier title to the small portion.

Notice from abstract.

Notice may be derived from statements in an abstract equally with statements in the deeds themselves: *Robinson* v. *Briggs*, 1 Sm. & G. 188.

Constructive notice from absence of title deeds.

A purchaser will be affected with constructive notice if he makes no inquiry whatever after the title deeds.

As between purchaser and incumbrancer.

Thus, where land had been conveyed to the trustees of a building society, but the conveyance, though executed, and with a receipt indorsed, had been retained by the vendors as security for part of the purchase-money remaining unpaid, their lien was held entitled to priority over the legal estate of purchasers of lots from the building society, who had not made any inquiry after the deeds: *Peto* v. *Hammond*, 30 Beav. 495. Compare this case with *Kettlewell* v. *Watson*, 26 Ch. D. 501, cited *post*, p. 329. See also *Hiern* v. *Mill*, 13 Ves. 114; *Tweedale* v. *Tweedale*, 23 Beav. 341; *Hipkins* v. *Amery*, 2 Giff. 292.

As between incumbrancers.

The same rule applies between two incumbrancers where the second although he obtains the legal estate makes no inquiry after the deeds: *Birch* v. *Ellames*, 2 Anst. 427; *Whitbread* v. *Jordan*, 1 Y. & C. Ex. 303; *Worthington* v. *Morgan*, 16 Sim. 547; *Hopgood* v. *Ernest*, 3 De G. J. & S. 116. See, however, *Plumb* v. *Fluitt*, 2 Anst. 432.

Reasonable excuse for non-production of deeds.

It is not sufficient merely to make inquiries after the deeds. If the deeds are not delivered to the purchaser he will be postponed to a prior equitable incumbrancer, unless a reasonable excuse has been given for not delivering them to him. What is a reasonable excuse depends upon circumstances. A statement that the deeds have been left at home by mistake is not a sufficient answer, and the purchaser should make further inquiries: *Spencer* v. *Clarke*, 9 Ch. D. 137; neither is an answer that the vendor has the title deeds in his possession unincumbered but that they are at his bankers, where in fact he had deposited

Insufficient reasons.

Chap. XXIII. s. 3.

them to secure his account current: *Maxfield* v. *Burton*, L. R. 17 Eq. 15.

Sufficient reasons.

On the other hand where a farmer unacquainted with legal business was taking a legal mortgage of leaseholds, and on his mortgage deed being handed to him asked whether he ought not also to have the lease delivered to him, and received for answer that he should have it but that as the mortgagor was rather busy then he would look for it and give it to him when he next came to market—this was held sufficient to prevent the mortgagee from being postponed to a prior equitable incumbrancer with whom the deed had been deposited by way of security: *Hewitt* v. *Loosemore*, 9 Hare, 449. This case is one of the leading authorities on the subject, and Turner, V.-C., in his judgment gave a useful summary of the earlier authorities as follows, at p. 456:—"Without reference to the authorities anterior to the case of *Plumb* v. *Fluitt* (2 Anst. 432), many of which, and particularly the later ones, are favourable to the doctrine there laid down, it was in that case held that nothing but fraud or gross and voluntary negligence in leaving the title deeds will oust the priority of a legal mortgagee; and that where the legal mortgagee had applied for the deeds, and had relied upon the promise of the mortgagor that he would send them, it was not such fraud or gross and voluntary negligence as would postpone him to a prior equitable mortgagee. The doctrine thus laid down was re-asserted by Lord Eldon in *Evans* v. *Bicknell* (6 Ves. 174), and again in *Martinez* v. *Cooper* (2 Rus. 198). It was recognized by Sir William Grant in *Barnett* v. *Weston* (12 Ves. 130), and by Sir John Leach in *Harper* v. *Faulder* (4 Mad. 129); and it was also affirmed by Lord Langdale in *Farrow* v. *Rees* (4 Beav. 18), and by Lord Cottenham in *Allen* v. *Knight* (5 Hare, 272, 11 Jur. 527); and I must take it therefore to be the doctrine of the Court unless there are other authorities to contradict it." The learned judge then, after considering the cases of *Jackson* v. *Rowe*, 2 Sim. and St. 472; *Dryden* v. *Frost*, 3 My. & Cr. 670; *Tylee* v. *Webb*, 6 Beav. 552; *Worthington* v. *Morgan*, 16 Sim. 547; *Hiern* v. *Mill*, 13 Ves. 114; and *Birch* v. *Ellames*, 2 Anst. 427, continued:—"The law, therefore, as I collect it from the authorities stands thus: That

a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title deeds, unless there be fraud or gross and wilful negligence on his part. That the Court will not impute fraud or gross or wilful negligence to the mortgagee, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but that the Court will impute fraud or gross and wilful negligence to the mortgagee if he omits all inquiry as to the deeds. And I think there is much principle both in the rule and the distinctions upon it."

This case of *Hewitt* v. *Loosemore* was followed in *Espin* v. *Pemberton* (3 De G. & J. 547), where it was held that a mortgagee of leaseholds, who had repeatedly asked for the lease, and had been told that the mortgagor had mislaid it, but would look for it and hand it to him, was not to be postponed to a prior equitable incumbrancer with whom the lease was deposited as security.

Notice of document which may affect title.

On similar grounds a mortgagee who, before advancing money, asked whether any settlement had been made on the marriage of the mortgagor and his wife, and was told that there had been a settlement of the wife's fortune only, and not of the husband's estate, which was proposed as the security, was held not affected with notice that the settlement in fact comprised the husband's estate: *Jones* v. *Smith*, 1 Ph. 244; and see *Carter* v. *Williams*, L. R. 9 Eq. 678.

Notice of document which must affect title.

With regard to the case of *Jones* v. *Smith*, it is to be observed that it only applies to cases where the purchaser has notice of a document which may or may not affect the title; if he has notice of a document which must necessarily affect the title, he is not justified in relying upon a statement of what the contents of that document are. He must see the document itself, or receive a sufficient answer for its not being forthcoming, see *Patman* v. *Harland*, 17 Ch. D. 353. This case decides that a purchaser is affected with notice of a document, although by the terms of the contract for sale or the provisions of an Act of Parliament he is precluded from demanding its production. "You may bargain to shut your eyes," said Jessel, M. R., p. 359, "but if you do wilfully shut your eyes, whether as a bargain or

Chap. XXIII. s. 3.

not, you must be liable to the consequences of shutting your eyes." And see *Peto* v. *Hammond*, 30 Beav. 495, 505.

Notice from physical condition of property.

The physical condition of the property may give notice to the purchaser of rights or restrictions to which it is subject.

Thus in *Morland* v. *Cook* (L. R. 6 Eq. 252), the purchaser of property lying below the sea level, and protected by a wall, was affected with notice of a liability imposed upon his land of contributing to the repair of the wall. In *Hervey* v. *Smith* (22 Beav. 299; 1 K. & J. 389), the fact that a house contained only twelve flues, while there were fourteen chimney pots on the roof, was held to be sufficient to fix the purchaser with notice that the adjoining owner had rights over two of the chimneys. This case, however, was disapproved by Lord St. Leonards, see Sug. V. & P. 14th ed. p. 765. The existence of an archway forming the only approach to land at the back was held to give notice of a right of way through it: *Davies* v. *Sear*, L. R. 7 Eq. 427.

But in these cases the purchaser is only affected with notice when the condition of the property cannot reasonably be accounted for except on the supposition that some right or easement over it exists. Thus the fact that the land is overlooked by a window is only notice of the fact that the window exists, whether an ancient light or not; it is not notice of any agreement that the light shall not be obstructed: *Allen* v. *Seckham*, 11 Ch. D. 790.

Notice from tenancy.

The fact that the property is in the occupation of anyone is notice of the interest of the tenant, either under his lease or under an agreement to purchase: *Daniels* v. *Davison*, 16 Ves. 249. So the occupation of a house by a firm as business premises is notice that under the articles of partnership the house is partnership property: *Cavander* v. *Bulteel*, L. R. 9 Ch. 79. The purchaser should, therefore, before he completes, make inquiries of the tenant respecting his interest. He need make no inquiries before the contract, for the rule as to constructive notice of the interest of the tenant does not apply as between vendor and purchaser, see *ante*, p. 68.

Sect. 4.—*Notice through an Agent.*

Knowledge of agent imputed to principal.

The knowledge of the agent is imputed to the principal, on the ground that the agent is presumed to communicate his knowledge to his principal. This presumption of law cannot be rebutted by proving that as a matter of fact the agent made no communication. It can only be rebutted by proving that the agent was a party to the fraud which he has concealed. See *post*, p. 324.

If, therefore, the agent has actual notice, actual notice is imputed to the principal; if the agent has constructive notice, constructive notice is imputed to the principal.

Actual notice to agent is actual notice to principal.

In many cases actual notice to the agent is treated as constructive notice to the principal. Thus in *Espin* v. *Pemberton* (3 De G. & J. 547, 554), Lord Chelmsford, L. C., speaking of actual notice to a solicitor, says, "The notice which a client is supposed to receive through his solicitor is generally treated as constructive notice. I think it would tend very much to clearness in these cases, if it were classed under the head of actual notice. The notice which affects the principal through a solicitor does not depend upon whether it is communicated to him or not. If a person employs a solicitor, who either knows or has imparted to him in the course of his employment some fact which affects the transaction, the principal is bound by the fact, whether it is communicated to or concealed from him. Constructive notice, properly so called, is the knowledge which the Courts impute to a person upon a presumption so strong of the existence of the knowledge, that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry, or from his wilfully abstaining from inquiry, to avoid notice. I should, therefore, prefer calling the knowledge which a person has, either by himself or through his agent, actual knowledge; or if it is necessary to make a distinction between the knowledge which a person possesses himself, and that which is known to his agent, the latter might be called imputed knowledge."

And, again, Lord Hatherley, L. C., in *Rolland* v. *Hart* (L. R. 6 Ch. 678, 681), says, "It has been held over and over

Chap. XXIII. s. 4.

again that notice to a solicitor of a transaction and about a matter as to which it is part of his duty to inform himself, is actual notice to the client." And in *Agra Bank* v. *Barry* (L. R. 7 H. L. 135), Lord Cairns, L. C., says, p. 148, "The knowledge of the agent is the knowledge of the principal." See also *Tunstall* v. *Trappes*, 3 Sim. 301, 307.

Notice to London agent.

If a solicitor in the country acts through a town agent, he is still acting as solicitor, and notice to him is notice to his clients: *Norris* v. *Le Neve*, 3 Atk. 36.

If a father purchases in the name of his son, notice to the father affects the son also: *Coote* v. *Mammon*, 5 Bro. P. C. 355.

An infant interested in the purchase is equally affected with notice to his agent, even though the purchase is made with the sanction of the Court: *Toulmin* v. *Steere*, 3 Mer. 210.

Notice must be in same transaction.

Whatever the notice to the agent may be, whether actual or constructive, it must be in the same transaction. See Conveyancing Act, 1882, s. 3.

Connected transactions.

The rule that the notice must have been given in the same transaction was held not to apply where one transaction was closely followed by and connected with another, or it was clear that a previous transaction was present to the mind of the solicitor when engaged in another transaction: *Hargreaves* v. *Rothwell*, 1 Keen, 154; and see *Brotherton* v. *Hatt*, 2 Vern. 574; *Perkins* v. *Bradley*, 1 Hare, 219, where the solicitor in the first transaction was himself concerned as principal in the second: *Fuller* v. *Benett*, 2 Hare, 394. See also the remarks of Lord Eldon in *Mountford* v. *Scott*, T. & R. 280, and *Nixon* v. *Hamilton*, 2 Dru. & Wal. 364. It may be a question whether these cases are overruled by the Conveyancing Act, 1882, s. 3, sub-s. 1 (ii).

It does not follow because a solicitor is in the habit of acting for a man that he is that man's agent to bind him by receiving notices or information. This was decided by the Court of Appeal in *Saffron Walden Building Society* v. *Rayner* (14 Ch. D. 406), in which case solicitors who were employed by the trustees and executors of a testator in all matters relating to the estate accepted on behalf of the trustees notice of a mortgage of a reversionary share of the estate, and according to their account read the notice to the trustees. This, however, the trustees denied or

did not remember, and notice of subsequent incumbrances on the same share having been duly given to the trustees, the first mortgagee was postponed to the subsequent incumbrancers.

Same solicitor.

Notice may be imputed through a solicitor or agent, although he acts for both parties, for as Lord Hardwicke says in *Le Neve* v. *Le Neve* (Amb. 436), "In purchases, and more especially in mortgages, very frequently the same counsel and agents are employed on both sides, and therefore each side is affected with notice as much as if different counsel and agents had been employed." See also *Sheldon* v. *Cox*, Amb. 626; *Dryden* v. *Frost*, 3 My. & Cr. 670; *Fuller* v. *Benett*, 2 Hare, 394; *Frail* v. *Ellis*, 16 Beav. 350; *Tweedale* v. *Tweedale*, 23 Beav. 341; *Re Marseilles Extension Ry. Co.*, L. R. 7 Ch. 161.

One solicitor not necessarily solicitor for both parties.

In such cases it is necessary to prove that the solicitor was really acting for the party to whom it is sought to impute notice, and for this it is not sufficient merely to prove that there was only one solicitor acting in the transaction: *Perry* v. *Holl*, 2 De G. F. & J. 38. So the fact of a mortgagor being himself a solicitor, and preparing the mortgage deed on behalf of the mortgagee, who employed no other solicitor, is not sufficient to constitute the mortgagor the solicitor of the mortgagee so as to fix the latter with notice of an incumbrance known to the mortgagor: *Espin* v. *Pemberton*, 3 De G. & J. 547 (overruling on this point *Hewitt* v. *Loosemore*, 9 Hare, 449), where Lord Chelmsford, L. C., says, p. 554, "I find it very difficult to accede to the proposition, however high may be the authority from which it proceeds, that where a mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction. I think that there ought to be some consent on the part of the mortgagee to constitute this relation between them."

Solicitor merely to obtain execution of deed.

The employment of a solicitor merely to obtain the execution of a deed is not sufficient to fix with notice through that solicitor: *Wyllie* v. *Pollen*, 32 L. J. Ch. 782. In *Kettlewell* v. *Watson* (26 Ch. D. 501), where a sub-purchaser of a small plot allowed the purchasers at their suggestion to manage the business for him, and to employ their own solicitor to prepare the

Chap. XXIII. s. 4.

conveyance to him, this was held not sufficient to fix him with notice through the solicitor of the vendor's lien for unpaid purchase-money, because it was not the duty of the solicitor in such a case to communicate anything to the sub-purchaser.

Solicitor author of fraud.

This presumption, that the solicitor has communicated what he knows to his client, because it is his duty to do so, is capable of being rebutted by showing that the solicitor is himself a party to the fraud of which it is sought to affect his client with notice. This was decided in the case of *Kennedy* v. *Green* (3 Myl. & K. 699), a case which has been much discussed since, but which is now fully recognized as law. Thus, Bacon, V.-C., in *Waldy* v. *Gray* (L. R. 20 Eq. 238, 251), says, "*Kennedy* v. *Green* lays down a principle which must commend itself to everybody's sense of justice. If a professional man is employed in a transaction, the law imputes to the client who employs him the knowledge which the solicitor so employed possesses. But then that is subject to this plain qualification. If the disclosure of that fact of which knowledge is sought to be fixed upon the client would have imputed fraud to the solicitor, it is not to be presumed that the solicitor did make disclosure of that fact." See also *Hiorns* v. *Holtom*, 16 Beav. 259; *Ogilvie* v. *Jeaffreson*, 2 Giff. 353; *Re European Bank*, L. R. 5 Ch. 358; *Hunter* v. *Walters*, L. R. 7 Ch. 75; *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394.

Burden of proof in client.

In all these cases where the client alleges that the solicitor did not communicate his knowledge, because he was himself a party to the fraud, the burden of proof lies on the client to show that there is a probability amounting to a moral certainty that the solicitor did not communicate the fact to his client: *Thompson* v. *Cartwright*, 33 Beav. 178, 185, 2 De G. J. & S. 10; *Cave* v. *Cave*, 15 Ch. D. 639, 644.

Fraud must be independent of the concealment.

It is not sufficient merely to prove that the solicitor grossly neglected his duty: *Rolland* v. *Hart*, L. R. 6 Ch. 678; or even that it was to his interest not to communicate the fact, because the Court will presume that he performed his duty, even although it was against his interest: *Bradley* v. *Riches*, 9 Ch. D. 189. In fact, the fraud must not consist merely in the fact of concealment, but must be independent of the question whether

the act which had been done was made known or not, see judgment of Turner, L. J., in *Atterbury* v. *Wallis*, 8 De G. M. & G. 454, 466. Nor must the conveyance to the purchaser or mortgagee be itself the fraud which has been concealed: thus where one of three trustees, himself a solicitor, executed a conveyance of the trust property for valuable consideration to a purchaser for whom he acted as solicitor, and actually forged the names of his co-trustees, the purchaser was held affected with notice of the trust: *Boursot* v. *Savage*, L. R. 2 Eq. 134.

The case of *Sharpe* v. *Foy* (L. R. 4 Ch. 35), seems, at first sight, inconsistent with the rule just stated. In this case a husband and wife, and their solicitor, joined in concealing from a mortgagee of the wife's estate, for whom also the solicitor was acting, a settlement made on her marriage when an infant, under which settlement her children would be entitled, and it was held that the mortgagee was not affected with notice of the settlement through his solicitor. But the settlement was merely a covenant by the husband to use his best endeavours to induce his wife to settle the property when she came of age. And the decision turned on this point, for Lord Hatherley said, p. 41, "No settlement had been executed. The wife had the absolute estate, subject only to the covenant of the husband. The plaintiff advanced his money upon the wife's representation that she had the absolute interest. As to the equitable interest, therefore, he had a prior right to those claiming under the settlement to prevent her from disappointing him, and he has now obtained the legal estate."

Sect. 5.—*Notice in a Register County.*

The Middlesex Registry Act.

The Act 7 Anne, c. 20, providing for the registration of deeds and wills in Middlesex, enacts that every deed or conveyance by the Act required to be registered shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial thereof be registered

Chap. XXIII. s. 5.

before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim; and so also with respect to wills not registered as by the Act provided.

With regard to this Act it is to be observed that it only makes unregistered deeds and wills void against registered deeds; it does not make registration equivalent to notice, or give any extra validity to registered deeds. Thus, in the county of Middlesex a subsequent legal mortgage made without notice of a prior equitable mortgage will prevail over such last-mentioned mortgage, although registered: *Morecock* v. *Dickins*, Amb. 678; and see *Bedford* v. *Bacchus*, 2 Eq. Ca. Abr. 615; *Re Russell Road Purchase-Moneys*, L. R. 12 Eq. 78.

The Irish Registry Act.

Under the Irish Registration Act (6 Anne, c. 2, Ir.), the instruments registered, whether legal or equitable, have priority according to the time of registration. See *Bushell* v. *Bushell*, 1 Sch. & L. 90; *Latouche* v. *Lord Dunsany*, *ibid.* 137, 159; *Drew* v. *Lord Norbury*, 3 J. & Lat. 267; *Mill* v. *Hill*, 3 H. L. C. 828; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

The Yorkshire Registries Act.

The Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), repeals the old Yorkshire Registry Acts, which were to the like effect as the Middlesex Registry Act, and follows the Irish Act in making priority depend upon the date of registration. It also goes much further, for it enacts that in Yorkshire no person shall lose his priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud; and it makes registration actual notice, see sects. 14, 15. The Act takes effect as from the 1st January, 1885.

It may still be a question whether, sect. 14 notwithstanding, a person who has actual notice of a prior unregistered claim can seek to oust that claim without committing actual fraud.

It is necessary to bear in mind the distinction thus made between the Middlesex and the Yorkshire Registries. For a complicated series of cases, dating from *Le Neve* v. *Le Neve*, have established that under the Middlesex and the old Yorkshire Acts registration did not give priority over any unregistered deed of which a person had actual notice. These cases

are still law so far as Middlesex is concerned; with respect to Yorkshire they are entirely swept away by the recent Act, except as to rights already acquired under them. See sect. 51.

Actual notice postpones.

Under the Middlesex and the old Yorkshire Registry Acts it has been quite settled ever since *Le Neve* v. *Le Neve* (Amb. 436), that where a purchaser has notice of a prior unregistered deed, he will take subject to that deed, although he registered his own deed first. And it makes no difference whether the notice be given to the principal or to his agent: *Le Neve* v. *Le Neve*, *Rolland* v. *Hart*, L. R. 6 Ch. 678; *Bradley* v. *Riches*, 9 Ch. D. 189.

Notice must be clearly proved.

But it is equally settled that actual notice must be clearly proved in order to postpone the registered deed: *Hine* v. *Dodd*, 2 Atk. 275; *Davis* v. *Strathmore*, 16 Ves. 427; *Wyatt* v. *Barwell*, 19 Ves. 435; *Chadwick* v. *Turner*, L. R. 1 Ch. 310. By actual notice is meant actual notice either to principal or agent, see the cases last above cited. This shows the importance of avoiding the confusion which ensues if actual notice to the agent is treated as constructive notice to the principal, see p. 321.

No constructive notice in register county.

Constructive notice merely is not sufficient. Thus, in the case of *Agra Bank* v. *Barry* (L. R. 7 H. L. 135), it was held that a legal mortgagee without the deeds of property in Ireland was not postponed to a prior unregistered equitable mortgagee by deposit of the deeds with a memorandum of charge. The solicitor for the legal mortgagee had inquired after the deeds, and was told, the transaction taking place in England, that they were at the mortgagor's place in Ireland. This was not considered sufficient notice of the equitable mortgage in a register county.

The words of Lord Selborne may be here quoted. He said, p. 157, "It has been said in argument that investigation of title and inquiry after deeds is the duty of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual

Chap. XXIII. s. 5.

manner for his own interest, ought, by himself or his solicitor, to follow with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained . . . . It would be quite inconsistent with the policy of the Register Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed, to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped from saying that, as to him, they are fraudulent."

In this case the earlier authorities are reviewed, and *Wormald* v. *Maitland* (35 L. J. Ch. 69), must be considered as overruled.

This case of *Agra Bank* v. *Barry* was followed, and even carried further by Jessel, M. R., in *Lee* v. *Clutton*, 45 L. J. Ch. 43. He there held that a purchaser was not affected with constructive notice of a prior unregistered charge by deposit of deeds accompanied with a memorandum of charge, although he made no inquiry whatever about the deeds, on the ground that it is the policy of the Registration Acts to free a purchaser from the imputation of constructive notice. In the absence of actual notice, therefore, to the principal or his agent, a later registered deed will have priority over a prior unregistered charge, notwithstanding that the purchaser knew that the title deeds were not in the possession of the vendor, but were in the hands of certain other persons, and abstained from inquiry. This decision was affirmed by the Court of Appeal, 46 L. J. Ch. 48.

Memorandum of charge must be registered.

In the cases hitherto cited there was something capable of being registered, such as a deed or memorandum. Now it has been held that a memorandum of charge is capable of being registered, and if not registered will not prevail over a subsequent legal or equitable title: *Moore* v. *Culverhouse*, 27 Beav. 639; *Neve* v. *Pennell*, 2 H. & M. 170; *Re Wight's Mortgage*, L. R. 16 Eq. 41; *Credland* v. *Potter*, L. R. 10 Ch. 8, overruling *Wright* v. *Stanfield*, 27 Beav. 8. But in *Sumpter* v.

Registration not applicable

Cooper (2 B. & Ad. 223, 226), the Registration Acts were held not to apply to the case of an equitable mortgage created by deposit of deeds without any writing, and in that case the equitable mortgagee was held to have a better right as against the assignees in bankruptcy of the mortgagor, they being only entitled to recover that to which the bankrupt was both legally and equitably entitled.

to mere deposit without writing.

The question whether an equitable mortgagee, by deposit of deeds without any memorandum, was, in a register county, entitled to priority as against a subsequent purchaser who made no inquiry whatever after the deeds, came before the Court to be determined in *Kettlewell* v. *Watson*, 26 Ch. D. 501. The learned judges there laid down that an equitable mortgagee, having the deeds but without a memorandum to register, was not to be postponed to a subsequent purchaser who made no inquiry after the deeds. At the same time they held that purchasers who had made no inquiry whatever after the deeds, and had not even searched the register, were entitled to priority over the vendors' lien for unpaid purchase-money, the circumstances being that the vendors had retained the deeds knowing that the land would be sold again in lots at low prices to small purchasers. This case is not easy to reconcile with *Peto* v. *Hammond* (30 Beav. 495), but it shows that, under the Middlesex or the old Yorkshire Registration Acts, it will be a very difficult matter to prove constructive notice of an equitable mortgage by deposit without a memorandum.

Vendor's lien where deeds retained without memorandum.

Such a case as *Kettlewell* v. *Watson* cannot in future arise in Yorkshire, for by sect. 7 of the Yorkshire Registries Act, 1884, which provides for the registration of any memorandum of lien or charge, it is enacted that no lien or charge in respect of any unpaid purchase-money, or by reason of any deposit of title deeds, shall have any effect or priority as against any registered assurance for valuable consideration, unless a memorandum thereof has been registered.

Memorandum of charge must be registered in Yorkshire.

A purchaser or mortgagee, without notice of a prior unregistered or imperfectly registered incumbrance, may by prior registration acquire priority, even though he has notice of the incumbrance between the date of his own conveyance and his

Registration after notice of unregistered instrument.

Chap. XXIII. s. 5.

registration: *Essex* v. *Baugh*, 1 Y. & C. C. 620; *Elsey* v. *Lutyens*, 8 Hare, 159.

Purchaser from person who has not registered.

But where a purchaser fails to register his conveyance, no purchaser or mortgagee from him can acquire a better title by registering his own purchase or mortgage deed: *Lessee of Rennick* v. *Armstrong*, Hud. & B. 727; *Battersby* v. *Rochfort*, 2 J. & Lat. 431. Nor does it avail to register an assignment of a lease where the lease itself is not registered: *Honeycomb* v. *Waldron*, 2 Str. 1064; and see *Warburton* v. *Loveland*, 2 Dow. & Cl. 480; for it is the deed under which the party claims which must be registered; and see Yorkshire Registries Act, 1884, ss. 14, 17.

Registration of wills in Middlesex.

With regard to wills, the Middlesex and the old Yorkshire Registration Acts require them to be registered within six months of the death of the testator, or within three years if he dies beyond seas. In the case of *Chadwick* v. *Turner* (L. R. 1 Ch. 310), it was decided that where a will was not discovered until more than six months after the death of the testator it could not be duly registered, and that a purchaser or mortgagee from the heir-at-law without notice of the will was entitled to priority over the devisees.

37 & 38 Vict. c. 78, s. 8.

By the Vendor and Purchaser Act, 1874, s. 8, it is enacted that "where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee, or by some one deriving title under him, shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law."

Registration of wills in Yorkshire.

By the Yorkshire Registries Act, 1884, the will may be registered: Sect. 4; or if this cannot be done within six months from the testator's death, a notice of the will may within that period be registered under sect. 11, and if such registration of notice be followed by registration of the will itself within two years from the testator's death, the will shall be deemed to have been registered upon the date of registration of notice.

Every will registered as aforesaid will have priority according to the date of the death of the testator. Every will not registered or deemed to be registered within six months of the

death of the testator will have priority according to the date of registration: sect. 14.

Affidavit of intestacy.

Where a person is believed to have died intestate, his heir may register an affidavit of intestacy at any time after six months from the death; and thereupon any assurance by such heir for valuable consideration, if registered before the registration of any will not registered or deemed to be registered within six months from the death, shall have priority over such will: Sect. 12.

CHAPTER XXIV.

PURCHASE FOR VALUE WITHOUT NOTICE.

SECT.		PAGE
1.	*The defence: to what it extends*	332
	i. *Against the legal estate*	332
	ii. *As between equities*	334
2.	*Protection afforded by legal estate*	335
	i. *Where equities are equal the law shall prevail*	335
	ii. *Legal estate acquired by fraud*	335
	iii. *Acquired from a trustee*	336
	iv. *Legal mortgagee without the deeds*	337
3.	*Tacking of mortgages*	338
	i. *Third mortgagee buying in first*	338
	ii. *Further advances*	339
	iii. *Debts tacked to mortgage*	340
3.	*Tacking of mortgages*—cont.	
	iv. *Statutes prohibiting tacking*	341
4.	*Consolidation of mortgages*	342
	i. *What mortgages may be consolidated*	342
	ii. *As against whom*	342
	iii. *Conveyancing Act*, 1881, *s.* 17	343
5.	*Priority among equitable interests*	344
	i. *Qui prior est tempore*	344
	ii. *Equitable mortgagee without all the deeds*	344
	iii. *Best right to call for legal estate*	345
	iv. *Receipt endorsed by building society*	346

SECT. 1.—*The Defence. To what it extends.*

WHERE a person has *bonâ fide* purchased for valuable consideration without notice of any adverse claim, the Court will give no assistance to such adverse claimant seeking to recover the estate from the *bonâ fide* purchaser: *Basset* v. *Nosworthy*, Rep. temp. Finch, 102, 2 W. & T. L. C. 1.

Against the legal estate.

In *Phillips* v. *Phillips* (4 De G. F. & J. 208, 216), Lord Westbury, L.C., said:—"Now the defence of a purchaser for valuable consideration is the creature of a Court of equity, and it can never be used in a manner at variance with the elementary rules which have already been stated. It seems at first to have been used as a shield against the claim in equity of persons

having a legal title. *Basset* v. *Nosworthy* is, if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance, together with the maxim which I have referred to, probably gave rise to the notion that this defence was good only against the legal title. But there appear to be three cases in which the use of this defence is most familiar:—

"First, where an application is made to an auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case in *Basset* v. *Nosworthy*), or by a tenant for life for the delivery of title deeds (which was the case of *Wallwyn* v. *Lee*, 9 Ves. 24), and the defendant pleads that he is a *bonâ fide* purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is, that as against a purchaser for valuable consideration without notice the Court gives no assistance,—that is, no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of law. Thus, it was decided by Lord Thurlow in *Williams* v. *Lambe* (3 Bro. C. C. 264), that the defence could not be pleaded to a bill for dower, and by Sir J. Leach, in *Collins* v. *Archer* (1 Russ. & M. 284), that it was no answer to a bill for fines. In those cases the Court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief.

"The second class of cases is the ordinary one of several purchasers or incumbrancers, each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate, not held upon existing trusts or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a Court of equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer the defendant may maintain the plea of purchase for valuable consideration without notice; for the principle is, that a Court of equity will not disarm a purchaser,—that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*.

"Thirdly, where there are circumstances that give rise to

an equity as distinguished from an equitable estate—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere."

This case of *Phillips* v. *Phillips* is disapproved of by Lord St. Leonards (see V. & P. 798), where he says: "Till the case of *Phillips* v. *Phillips*, the validity of the defence against an equitable title appears not to have been questioned." See also *Joyce* v. *De Moleyns*, 2 J. & Lat. 374. But the authority of the case is recognized as binding in *Cave* v. *Cave*, 15 Ch. D. 639, 646. See also *Newton* v. *Newton*, L. R. 4 Ch. 143.

The value of the defence of being a purchaser for value without notice seems to be considerably weakened by the recent decisions. In fact, in *Cave* v. *Cave* (15 Ch. D. 639, 646), Fry, J., says: "As between equitable interests the defence will not prevail where the circumstances are such as to require that this Court should determine the priorities between them." On the other hand, it seems from *Northern Counties Insurance Co.* v. *Whipp* (26 Ch. D. 482, and cases there cited), that a purchaser having the legal estate will, in general, receive the countenance of the Court. See further *Heath* v. *Crealock*, L. R. 10 Ch. 22, and *Basset* v. *Nosworthy*, 2 W. & T. L. C. 1, where the doctrine is fully discussed; also *Stackhouse* v. *Countess of Jersey*, 1 J. & H. 721.

Between equitable interests.

In fact, it may be doubted whether the defence can now be considered as of any value, except as against a claimant who acquired the property without consideration (see remarks of James, L. J., in *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259, 270), or as against a person claiming the benefit of a restrictive covenant entered into by a former owner of the land, see the judgment of Jessel, M. R., in *London & S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 562, 583.

The important point, therefore, in considering which of two innocent purchasers is entitled to priority is to ascertain where the legal estate lies, and if neither has the legal estate then which of them is earlier in date.

SECT. 2.—*Protection afforded by the Legal Estate.*

"The law shall prevail."

Acting on the maxim "Where equities are equal the law shall prevail," the Court will in such cases give priority to him whose superior luck or greater diligence has secured the legal estate, even against a prior incumbrancer: *Marsh* v. *Lee*, 2 Vent. 337; *Wortley* v. *Birkhead*, 2 Ves. sen. 571; *Plumb* v. *Fluitt*, Anst. 432. And this applies even though he can only make out his title to the legal estate by means of an instrument of which he had no notice at the time of his purchase, and which if he had had notice of it, and examined it, would have disclosed to him the title of the other claimant: *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259, overruling in effect *Carter* v. *Carter*, 3 K. & J. 617.

Legal estate acquired by fraud.

But no protection is afforded by a legal estate which the owner has been induced to convey by means of a fraud, even though the purchaser may not be connected with the fraud: *Eyre* v. *Burmester*, 10 H. L. C. 90; *Heath* v. *Crealock*, L. R. 10 Ch. 22; *à fortiori* where the deed purporting to convey the legal estate is forged: *Keate* v. *Phillips*, 18 Ch. D. 560; *Re Cooper*, 20 Ch. D. 611. And see *Fox* v. *Hawks*, 13 Ch. D. 822; also *Sir John Fagg's case*, 1 Ch. Cas. 68, cited 1 Vern. 52; *Harcourt* v. *Knowel*, cited 2 Vern. 159.

Where equitable estate has been fraudulently assigned to *bonâ fide* purchaser, who afterwards acquires legal estate.

The protection afforded by the legal estate honestly got in will be extended to innocent purchasers to whom the equitable interest has been assigned by means of a fraud in the vendor or mortgagor: *Young* v. *Young*, L. R. 3 Eq. 801; and even where the equitable title rests upon a forged document: *Jones* v. *Powles*, 3 Myl. & K. 581. In that case Sir John Leach, M.R., after examining the authorities, came to the conclusion that "the protection of the legal estate is to be extended, not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence." See also *Bowen* v. *Evans*, 1 J. & Lat. 178, 264; *Newman* v. *Newman*, 28 Ch. D. 674.

Where, however, a person representing himself by means of forged deeds to be legally and equitably entitled to property, obtains an advance and purports to give a legal mortgage, and afterwards having acquired the legal estate mortgages it to another, the first mortgagee cannot claim the benefit of the legal estate by estoppel as against the subsequent incumbrancer to whom it has been actually conveyed: *General Finance Company* v. *Liberator Building Society*, 10 Ch. D. 15.

Legal estate may be acquired afterwards.

It is not necessary that the legal estate should be acquired at the same time as the equitable. "There is nothing more familiar than the doctrine of equity that a man, who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title if he can and may hold it; though during the interval between the payment and the getting in the legal title, he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself:" per Lord Selborne, L. C., in *Blackwood* v. *London Chartered Bank of Australia*, L. R. 5 P. C. 92, 111.

Legal estate acquired from a trustee.

But the purchaser cannot protect himself by taking a conveyance of the legal estate from a trustee after he had notice of the trust, for by so doing he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust: *Saunders* v. *Dehew*, 2 Vern. 271; *Allen* v. *Knight*, 5 Hare, 272, affd. 11 Jur. 527; *Baillie* v. *M'Kewan*, 35 Beav. 177; and *quære* whether he would be in a better position if he had no notice of the trust: *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556.

Nor does one of several incumbrancers obtain priority over the others by getting in the legal estate from the person who holds it as trustee for all the incumbrancers: *Sharples* v. *Adams*, 32 Beav. 213; *Maxfield* v. *Burton*, L. R. 17 Eq. 15.

Even where the legal estate is outstanding, the purchaser best entitled to call for it will be entitled to priority: *Willoughby* v. *Willoughby*, 1 T. R. 763; and see *post*, p. 345.

A legal estate to give priority was held to be not necessarily such an estate as would enable the holder to bring ejectment: see *Re Russell Road Purchase Moneys*, L. R. 12 Eq. 78, where

a reversion of two days on a lease was held sufficient by V.-C. Malins.

Legal mortgagee who makes no inquiry after deeds postponed.

Notwithstanding the maxim "Where equities are equal the law shall prevail," a legal mortgagee will be postponed to a subsequent equitable incumbrancer, if he has made no inquiry whatever after the deeds: *Worthington* v. *Morgan*, 16 Sim. 547; *Clarke* v. *Palmer*, 21 Ch. D. 124.

Reasonable excuse for non-production.

But he will not be postponed if, having made inquiry for the deeds, he has received a reasonable excuse for their non-production (*Barnett* v. *Weston*, 12 Ves. 130; *Hewitt* v. *Loosemore*, 9 Hare, 449; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135); or if he has received part of the deeds under a reasonable belief that he was receiving all: *Hunt* v. *Elmes*, 2 De G. F. & J. 578; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652; *Colyer* v. *Finch*, 5 H. L. C. 905.

Legal mortgagee parting with deeds to mortgagor.

A mortgagee, although he has obtained the legal estate, will be postponed to a subsequent equitable incumbrancer if he has allowed the mortgagor to have the deeds for the very purpose of making another mortgage, and he must take the consequences if the mortgagor takes advantage of his possession of the deeds fraudulently to obtain a larger advance than was intended (*Perry Herrick* v. *Attwood*, 2 De G. & J. 21); or if, contrary to the intention of the legal mortgagee, he suppresses the fact of the first mortgage altogether: *Briggs* v. *Jones*, L. R. 10 Eq. 92.

For reasonable purpose.

He will not, however, be postponed if he has lent the deeds to the mortgagor upon a reasonable representation, such as that he wished to show them to an intending purchaser to satisfy him as to the covenants in a lease: *Peter* v. *Russell*, 1 Eq. Ca. Ab. 321; 2 Vern. 726; *Martinez* v. *Cooper*, 2 Russ. 198.

Neither will a person be postponed who, wishing to obtain an advance on security of title deeds, has entrusted them to an agent for that purpose, and the agent by forging a deed obtains an advance which he appropriates to his own use: *Fox* v. *Hawks*, 13 Ch. D. 822.

It seems that the only cases in which the legal mortgagee will be postponed to an equitable incumbrancer are—(1) where the legal mortgagee has never inquired for the deeds, or having inquired, has not received a reasonable excuse for their non-

delivery; (2) where the legal mortgagee, having obtained the deeds, has subsequently lent them to the mortgagor to enable him to obtain another advance; (3) where the legal mortgagee has been guilty of fraud in enabling the mortgagor to deal with the property: see *Northern Counties Insurance Co.* v. *Whipp*, 26 Ch. D. 482. In this case the manager of a company executed to them a legal mortgage of his freehold estate; the mortgage and the title deeds were deposited in a safe of the company, of which the manager had a key. Some time afterwards he removed the title deeds, leaving only the mortgage deed, and obtained an advance from a person who had no notice of the claim of the company, and to whom he purported to execute a legal mortgage, and handed over the title deeds. It is to be observed that in this case the subsequent mortgagee had done everything possible to obtain a good title. She had examined the title deeds, had a regular conveyance executed to her, and had taken over the deeds. The fraud could not have been perpetrated had it not been for the carelessness of the first mortgagees. That carelessness, in the opinion of the Lords Justices, might be called gross; nevertheless, as it did not amount to fraud, they reversed the decision of the V.-C. of the County Palatine of Lancaster, and decided that the company had priority over the second incumbrancer, who could not have been defrauded except through their own gross carelessness.

Sect. 3.—*Tacking of Mortgages.*

Third mortgagee buying in first.

In *Marsh* v. *Lee* (2 Vent. 337; 1 W. & T. L. C. 659) it was decided that "a purchaser or mortgagee coming in upon a valuable consideration without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first though before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage."

Must have legal estate.

The incumbrance which he buys must confer upon him the legal estate: *Ibid.*; *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Wortley* v. *Birkhead*, 2 Ves. sen. 571; *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139.

But having succeeded in getting in the legal estate by buying up a first mortgage, a subsequent incumbrancer may tack, although he advanced his money in the first instance to a person in possession who fraudulently represented himself as owner, at any rate as against devisees under the will of the first mortgagor: *Young* v. *Young*, L. R. 3 Eq. 801.

Moreover, an equitable mortgagee subsequently obtaining a conveyance of the legal estate from the mortgagor himself, in pursuance of an agreement to give a legal mortgage, is in the same position as if he obtained it by buying in a legal mortgage: *Cooke* v. *Wilton*, 29 Beav. 100.

Legal estate must be actually in person seeking to tack.

It is not sufficient to enable an incumbrancer to tack that he should have merely the better right to call for the legal estate; he must have actually got it: *Frere* v. *Moore*, 8 Pri. 475; and see *Maundrell* v. *Maundrell*, 10 Ves. 271; *Ex parte Knott*, 11 Ves. 609; *Pease* v. *Jackson*, L. R. 3 Ch. 576. And if, having acquired the legal estate, he afterwards parts with it, his right to tack is gone: *Rooper* v. *Harrison*, 2 K. & J. 86.

First mortgagee making further advances.

The right to tack extends to a first mortgagee making further advances, without notice of the intervening incumbrance: *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Spencer* v. *Pearson*, 24 Beav. 266.

No notice of second mortgage.

But the *puisne* mortgagee, when he lent his money, or the first mortgagee, when he made the further advances, must have had no notice of the intervening incumbrance: *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Hiles* v. *Moore*, 15 Beav. 175, 181.

Mortgage to cover "further advances."

This rule applies even where the first mortgage is expressly made to extend to future advances: *Shaw* v. *Neale*, 6 H. L. C. 581; *Hopkinson* v. *Rolt*, 9 H. L. C. 514. And there is no custom to the contrary in favour of brewers as against distillers: *Daun* v. *City of London Brewery Co.*, L. R. 8 Eq. 155; *Menzies* v. *Lightfoot*, L. R. 11 Eq. 459.

Incumbrancer must be entitled to both mortgages in same interest.

The subsequent mortgage must not be vested in the first mortgagee merely as trustee (*Morret* v. *Paske*, 2 Atk. 52), or as executor: *Barnett* v. *Weston*, 12 Ves. 130. See, however, *Price* v. *Fastnedge*, Amb. 685; *Wilmot* v. *Pike*, 5 Hare, 14; *Shaw* v. *Neale*, 6 H. L. C. 581; *Spencer* v. *Pearson*, 24 Beav. 266; *Rooper* v. *Harrison*, 2 K. & J. 86.

The money must be advanced upon credit of the land; a charge on the proceeds of sale of land contracted to be sold cannot be tacked to the first mortgage, at any rate as against the purchaser: *Lacey* v. *Ingle*, 2 Ph. 413. See also *Matthews* v. *Cartwright*, 2 Atk. 347; *Ex parte Hooper*, 1 Mer. 7. As to consolidation of charges against a mortgagor, see p. 342.

Judgment creditors.

Judgment creditors have, since 27 & 28 Vict. c. 112, still a lien upon the land of the debtor: *Guest* v. *Cowbridge Ry. Co.*, L. R. 6 Eq. 619; *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275. They seem, therefore, to have a right to tack.

Incumbrance got in *pendente lite*.

The first mortgage may be got in, and the several incumbrances may be tacked *pendente lite* (*Marsh* v. *Lee*, 1 W. & T. L. C. 659; *Belchier* v. *Butler*, 1 Ed. 523; *Bates* v. *Johnson*, John. 304), but not after decree to settle priorities: *Earl of Bristol* v. *Hungerford*, 2 Vern. 524; *Wortley* v. *Birkhead*, 2 Ves. sen. 571; *Ex parte Knott*, 11 Ves. 609, 619. And a first mortgagee cannot buy in a third incumbrance *pendente lite*, so as to squeeze out the second, because at the time of paying the money for the third incumbrance he has notice of the second: *Morret* v. *Paske*, 2 Atk. 52.

Debts not being charged upon land tacked to a mortgage.

The foregoing cases show that a mortgagee may, even as against intervening incumbrancers, tack to his mortgage debts for which he has a lien or charge upon the land. With respect to debts for which he has no lien upon the land, he may tack them to a mortgage of real estate not against the mortgagor (Fisher's Mort. p. 573); but against the heir of the mortgagor (*Anon.* 2 Ves. sen. 662; *Jones* v. *Smith*, 2 Ves. jun. 376; *Elvy* v. *Norwood*, 5 De G. & S. 240); but not against the assignee of the heir (*Coleman* v. *Winch*, 1 P. Wms. 775); against a devisee of the mortgagor (*Du Vigier* v. *Lee*, 2 Hare, 326); but not a devisee upon trust to pay debts (*Heams* v. *Bance*, 3 Atk. 630; and see

Irby v. *Irby*, 22 Beav. 217) ; and not against creditors : *Lowthian* v. *Hasel*, 3 Bro. C. C. 162 ; *Hamerton* v. *Rogers*, 1 Ves. jun. 513 ; *Adams* v. *Claxton*, 6 Ves. 226 ; and see *Rolfe* v. *Chester*, 20 Beav. 610 ; *Thomas* v. *Thomas*, 22 Beav. 341.

It seems, however, that a debt incurred after the money due on the mortgage has been paid off, but before the estate has been reconveyed, cannot be tacked to that estate, even as against the mortgagor : see *Mayor of Brecon* v. *Seymour*, 26 Beav. 548.

A mortgagee of personal estate realizing his security after the death of the mortgagor insolvent, was held by Jessel, M. R., to be not entitled to retain any surplus after satisfying his mortgage in discharge of a simple contract debt due to him from the mortgagor : *Talbot* v. *Frere*, 9 Ch. D. 568 ; not following *Spalding* v. *Thompson*, 26 Beav. 637 ; *Re Haselfoot*, L. R. 13 Eq. 327 ; *Ex parte National Bank*, L. R. 14 Eq. 507.

Costs of action.

A mortgagee who, having attempted to sell, brings an action for specific performance against the purchaser, and fails owing to his own default, cannot tack his costs of action to the money due upon his mortgage : *Peers* v. *Ceeley*, 15 Beav. 209.

Legislative prohibitions of tacking.

The 7th section of the Vendor and Purchaser Act, 1874, enacted that no priority should be given to any interest in land by tacking it to any other interest in such land ; but this section was repealed as to England by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 129, as from the date at which it came into operation, except as to anything duly done thereunder before 1st January, 1876, and as to Ireland by the Conveyancing Act, 1881, s. 73. As regards England, the section was in operation from the 7th August, 1874, to the 1st January, 1876 : see *Robinson* v. *Trevor*, 12 Q. B. D. 423.

By the Yorkshire Registries Act, 1884, sect. 16, tacking is not to be allowed in Yorkshire, except as against an interest which existed prior to the 1st January, 1885.

Sect. 4.—*Consolidation of Mortgages.*

Right of consolidation.

Where a mortgagee holds two securities for two different debts on two different properties of the same mortgagor, he may refuse to allow one property to be redeemed, unless the money owing on the other security is also paid. This is called consolidation, and the right exists equally in actions for foreclosure and for redemption; neither is it lost by sale of one of the mortgaged estates: *Selby* v. *Pomfret*, 3 De G. F. & J. 595; and see *Clapham* v. *Andrews*, 27 Ch. D. 679. It prevails not only where the two mortgages were originally made to the same mortgagee, but also where they have subsequently become united in the same person: *Selby* v. *Pomfret*, *ubi sup.*

What mortgages may be consolidated.

A mortgage of personalty may be consolidated with a mortgage of realty: *Watts* v. *Symes*, 1 De G. M. & G. 240. But the doctrine does not apply to bills of sale: *Chesworth* v. *Hunt*, 5 C. P. D. 266. A mortgage by one person cannot be consolidated with a mortgage by the same and another person jointly to secure a different debt: *Cummins* v. *Fletcher*, 14 Ch. D. 699; *Re Raggett*, 16 Ch. D. 117. Until default the right of consolidation does not arise: *Cummins* v. *Fletcher*, 14 Ch. D. 699. Where one mortgaged property has ceased to exist, as by forfeiture of a lease, the debt owing thereon cannot be consolidated with that owing on the security of other property: *Re Raggett*, 16 Ch. D. 117.

Legal estate not necessary.

It is not necessary that the mortgagee seeking to consolidate should have the legal estate, as the mortgagee seeking to tack must have: *Neve* v. *Pennell*, 2 H. & M. 170, 183; *Cracknall* v. *Janson*, 11 Ch. D. 1.

As against persons claiming under the mortgagor.

The right to consolidate prevails not only against the mortgagor and his heir (*Margrave* v. *Le Hooke*, 2 Vern. 207), but also against his trustee in bankruptcy (*Selby* v. *Pomfret*, 3 De G. F. & J. 595), a puisne incumbrancer (*Neve* v. *Pennell*, 2 H. & M. 170), and a purchaser: *Ex parte Carter*, Amb. 733; *Ireson* v. *Denn*, 2 Cox, 425; and see *Jones* v. *Smith*, 2 Ves. jun. 376; *Titley* v. *Jenyns*, 2 Y. & C. C. 399.

But where it is sought to enforce the right against any one except the mortgagor, considerable qualifications have been

introduced by recent cases. Thus, if at the time the mortgage of the second estate is made to the mortgagee of the first, the mortgagor has parted with his equity of redemption in the latter, the mortgagee cannot consolidate (*Mills* v. *Jennings*, 13 Ch. D. 639; *S. C. Jennings* v. *Jordan*, 6 App. Cas. 698, overruling *Tassell* v. *Smith*, 2 De G. & J. 713); and *quære* whether *Vint* v. *Padget* (2 De G. & J. 611) would now be followed. So, if at the time the two mortgages become united in the same person, the two equities of redemption are vested in two different persons, the right to consolidate does not arise: *White* v. *Hillacre*, 3 Y. & C. Ex. 597, 609; *Harter* v. *Colman*, 19 Ch. D. 630, disapproving *Beevor* v. *Luck*, L. R. 4 Eq. 537; and see *Selby* v. *Pomfret*, 3 De G. F. & J. 595. And it seems that the same rule will prevail, although the persons against whom it is sought to consolidate claim under a voluntary settlement: *Re Walhampton's Estate*, 26 Ch. D. 391.

Notice to mortgagee.

These decisions seem to render it unnecessary to consider whether at the time when the mortgage of the one property was made or transferred to the mortgagee of the other property, he had notice of any assignment of the equity of redemption, as in *Baker* v. *Gray*, 1 Ch. D. 491.

Notice to purchaser.

But when the right to consolidate has arisen, then it makes no difference that the purchaser of the equity of redemption in one property had no notice of the mortgage on the other: *Ireson* v. *Denn*, 2 Cox, 425; and see cases cited in note to *Willie* v. *Lugg*, 2 Ed. 80; *Neve* v. *Pennell*, 2 H. & M. 170.

Conveyancing Act, 1881, s. 17.

By the Conveyancing Act, 1881, s. 17, a restriction is placed on consolidation of mortgages; but this only applies where the mortgages or one of them are or is made after the 1st January, 1882, and where no contrary intention is expressed in either of the deeds.

Sect. 5.—*Priority among Equitable Interests.*

"*Qui prior est tempore.*"

Among claimants, all having equal equities, "*Qui prior est tempore, potior est jure:*" *Rice* v. *Rice*, 2 Drew. 73, where the doctrine is very carefully considered and explained; *Phillips* v. *Phillips*, 4 De G. F. & J. 208, 215; *Cave* v. *Cave*, 15 Ch. D. 639, 646.

Priority lost by neglect.

But an equitable claimant prior in point of time may lose his priority by his own act or neglect. What is sufficient carelessness or negligence must depend on the circumstances of each case. A greater degree of carelessness will be required to deprive of his priority a legal mortgagee than a mere equitable incumbrancer: see *Northern Counties Insurance Co.* v. *Whipp*, 26 Ch. D. 482, *ante*, p. 338. The burden of displacing the prior charge lies on the subsequent incumbrancer: *Roberts* v. *Croft*, 24 Beav. 223, 229; 2 De G. & J. 1; *Allen* v. *Knight*, 5 Hare, 272.

Deposit of some only of deeds.

An equitable mortgagee by deposit will not be postponed merely because he has accepted a parcel of deeds on the faith of a representation by the mortgagor that it contained all the deeds, whereas in fact some were kept back and afterwards deposited with another: *Hunt* v. *Elmes*, 2 De G. F. & J. 578; *Dixon* v. *Muckleston*, L. R. 8 Ch. 155. It is not even necessary that the deeds deposited should show title in the depositor: *Roberts* v. *Croft*, 2 De G. & J. 1. But the deeds deposited must be some of the material deeds: *Lacon* v. *Allen*, 3 Drew. 579.

Equitable mortgagee without any deeds deposited.

But an equitable mortgagee who never obtains the deeds will be postponed to a subsequent incumbrancer by deposit: *Layard* v. *Maud*, L. R. 4 Eq. 397; and see *Stanhope* v. *Verney*, 2 Ed. 81. See 2 Drew. 81; *Foster* v. *Blackstone*, 1 Myl. & K. 297, 307.

This will be so even where the first mortgagee was deceived by the fraud of the mortgagor, who represented himself to be owner by means of forged deeds; and the mortgage deed will not operate as an estoppel as against a subsequent incumbrancer by deposit, to whom the genuine deeds have been delivered: *Keate* v. *Phillips*, 18 Ch. D. 560.

In like manner a vendor's lien for unpaid purchase-money, where he has executed the deed and endorsed the receipt, and

delivered the deeds to the purchaser, will be postponed to a subsequent mortgage by deposit: *Rice* v. *Rice*, 2 Drew. 73.

So, where a vendor who has contracted to sell, and to set off a debt owing by him to the purchaser against part of the purchase-money, before completion hands over the deeds to another by way of equitable mortgage, the equitable mortgagee, not having notice of the contract, will have priority to the extent of the debt: *Rayne* v. *Baker*, 1 Giff. 241.

Equitable mortgagee who lets mortgagor have back his deeds.

It seems that in every case where an equitable mortgagee who has had the deeds allows them back into the custody of the mortgagor, who thereupon creates a fresh incumbrance by deposit, the prior mortgagee will be postponed to the subsequent incumbrancer, even though the deeds were given up on a reasonable request of the mortgagor, as that he wished to show them to an intending purchaser: *Waldron* v. *Sloper*, 1 Drew. 193; *Dowle* v. *Saunders*, 2 H. & M. 242; or even though the mortgagor obtained them from the mortgagee by fraud: *Hunter* v. *Walters*, L. R. 7 Ch. 75; *Re Lord Southampton's Estate*, 16 Ch. D. 178.

Notice to trustees.

Equitable incumbrancers on personal estate in the hands of trustees take priority according to the dates of their notices to the trustees: *Bridge* v. *Beadon*, L. R. 3 Eq. 664; *Calisher* v. *Forbes*, L. R. 7 Ch. 109; *Spencer* v. *Clarke*, 9 Ch. D. 137; *Pinnock* v. *Bailey*, 23 Ch. D. 497. But this rule does not apply to real estate (*Wilmot* v. *Pike*, 5 Hare, 14; *Rooper* v. *Harrison*, 2 K. & J. 86), unless it has been converted into personalty: *Re Hughes' Trusts*, 2 H. & M. 89. See also *Foster* v. *Blackstone*, 1 Myl. & K. 297; *Jones* v. *Jones*, 8 Sim. 633, 641; *Foster* v. *Cockerell*, 3 Cl. & Fin. 456; *Lee* v. *Howlett*, 2 K. & J. 531.

Notice to the solicitors of the trustees is not sufficient, even though accepted by them on behalf of their clients. It must be given to the trustees themselves: *Saffron Walden Building Society* v. *Rayner*, 14 Ch. D. 406.

Best right to call for legal estate.

The rule has been frequently laid down that among equitable incumbrancers if one of them has the better right to call for the legal estate, he will be entitled to priority: *Willoughby* v.

Willoughby, 1 T. R. 763. See also *Wilkes* v. *Bodington*, 2 Vern. 599; *Pomfret* v. *Windsor*, 2 Ves. sen. 472, 486; *Ex parte Knott*, 11 Ves. 618; *Bowen* v. *Evans*, 1 J. & Lat. 178, 264; *Wilmot* v. *Pike*, 5 Hare, 14, 22. This rule in effect is only another way of saying that the equities are not equal; but it is of some importance in the case of mortgages to building societies.

Receipt indorsed by building society.

The 5th section of 6 & 7 Will. 4, c. 32, and the 42nd section of 37 & 38 Vict. c. 42, both enact that the receipt of the society for the moneys secured, indorsed as provided on the mortgage, shall vacate the same and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption without any reconveyance.

Where, therefore, there is a first mortgage to a building society, and subsequent mortgages to other incumbrancers, and the mortgagor pays off the building society, and the statutory receipt is indorsed, that has the effect of vesting the legal estate in the equitable mortgagee who is first in point of time: *Fourth City Building Society* v. *Williams*, 14 Ch. D. 140. See also *Meek* v. *Chamberlain*, 8 Q. B. D. 31. But if the society is paid off by an equitable mortgagee who had no notice of prior incumbrances, the legal estate will vest in him: *Pease* v. *Jackson*, L. R. 3 Ch. 576, overruling *Prosser* v. *Rice*, 28 Beav. 68; and see *Fourth City Building Society* v. *Williams*, 14 Ch. D. 140; *Robinson* v. *Trevor*, 12 Q. B. D. 423; *Sangster* v. *Cochrane*, 28 Ch. D. 298.

The result will be different if the society, instead of indorsing the statutory receipt, execute a regular conveyance: *Carlisle Banking Co.* v. *Thompson*, 33 W. R. 119.

It was held by Lord Cairns, L. C., in *Pease* v. *Jackson* (L. R. 3 Ch. 576), that a subsequent mortgagee acquiring the legal estate in this way over a prior incumbrancer could not tack, not being in as good a position as if he had got originally the legal estate by contract. This view was not taken by Jessel, M. R., in *Fourth City Building Society* v. *Williams* (14 Ch. D. 140), who there said that the point was not argued or sufficiently considered in *Pease* v. *Jackson*, and accordingly he held that the mortgagee acquired the legal estate for all purposes, including that of tacking. The point was again considered by Baggallay,

L. J. in *Robinson* v. *Trevor* (12 Q. B. D. 423), and he preferred Lord Cairns' decision; but the point scarcely arose in that case, as the dates of the advances were such as to bring them within the operation of the 7th section of the Vendor and Purchaser Act, 1874, preventing tacking.

The statutory receipt once indorsed, the building society cannot afterwards question the sufficiency of payment and make any further claim against the mortgagor in respect of the debt: *Harvey* v. *Municipal Building Society*, 26 Ch. D. 273.

CHAPTER XXV.

MISDESCRIPTION AND COMPENSATION.

SECT.		PAGE
1.	*What is a misdescription*	348
2.	*Effect of misdescription*	351
	i. *Whether it avoids the contract*	351
	ii. *Compensation*	351
	iii. *Indemnity*	353
	iv. *Recovery of deposit*	354
	v. *Damages for breach of contract*	354
3.	*Assessment of compensation*	356
4.	*Vendor's action. Specific performance without compensation*	359
	i. *No misdescription*	359
	ii. *Misdescription corrected by notice*	361
	iii. *Waiver*	363
5.	*Vendor's action. Specific performance with compensation*	364
	i. *In what cases enforced*	364
	ii. *Effect of condition*	366
6.	*Vendor's action. Specific performance refused*	367
	i. *Defects in quantity*	367
	ii. *Defects in the nature of the property*	369
	iii. *Defects in the estate or interest of the vendor*	372
7.	*Purchaser's action. Specific performance with compensation*	375
8.	*Purchaser's action. Compensation refused*	377
	i. *Express contract*	377
	ii. *Amount of compensation not ascertainable*	378
	iii. *Extreme hardship*	379
	iv. *Knowledge or notice*	380
	v. *Rights of third persons affected*	381

SECT. 1.—*What is a Misdescription.*

Description part of the contract.

ALTHOUGH a complete description of property, comprising every minute detail, can never be conveyed by words, it is the duty of the vendor to describe what he offers for sale in such terms as will serve, at least, to identify the subject-matter of the sale. Few vendors, however, stop there. Particulars, as a rule, are overladen with descriptive matter, which is not necessary for identification of the parcels, but is nevertheless

incorporated in the contract: *White* v. *Cuddon*, 8 Cl. & Fin. 766. If, then, this description is untrue in any respect, there is a breach of contract by the vendor, which will entitle the purchaser—according to the extent of the misdescription—to rescind the contract, to resist specific performance, or to obtain compensation in money for the defect.

Misdescription and fraud.

In the cases which fall under the head of *misdescription*, fraud is supposed to be absent. The error is presumed to have arisen from an innocent and excusable mistake. If there be fraud, or such gross negligence as in the eye of a court of equity amounts to fraud, different considerations are introduced; for fraud not only vitiates the contract, but operates as a personal bar to relief of any kind.

Misdescription and misrepresentation.

Misdescription must also be distinguished from misrepresentation, which is a false but not necessarily fraudulent statement, made in the course of the treaty, but which is not incorporated in the contract as one of its terms. This distinction is more fully treated in the next Chapter.

Patent defect.

The vendor is not bound to mention patent defects. As to these the maxim *caveat emptor* applies; and, if the purchaser buys in ignorance of them, he cannot, in general, obtain relief: *Oldfield* v. *Round*, 5 Ves. 508; *Cook* v. *Waugh*, 2 Giff. 201.

Purchase with knowledge of defect.

Even where there is a definite misdescription, it has been said that the knowledge of the purchaser puts an end to the misdescription. Thus, where an estate was described in the particulars as "all within a ring-fence," and it was in fact intersected by other lands, but the purchaser either knew this before the sale, or persevered with the treaty after he knew it, Sir W. Grant, M.R., decreed specific performance without compensation. The ground of this decision was that the defect was an object of sense; and that the defendant, if he were to get compensation, having knowledge of the defect, would obtain a double allowance: *Dyer* v. *Hargrave*, 10 Ves. 505. See also *Grant* v. *Munt*, Coop. 173; *Lord Brooke* v. *Rounthwaite*, 5 Hare, 298, 306; *King* v. *Wilson*, 6 Beav. 124.

Express contract for compensation.

This principle, however, does not apply where there is an express provision in the contract that compensation shall be made for errors of description. The purchaser is then entitled

to compensation notwithstanding his knowledge of the defect at the date of the contract: *Lett* v. *Randall*, 49 L. T. 71; *English* v. *Murray*, 32 W. R. 84.

Latent defects.

Latent defects, not being apparent to sense, should be specified in the description of the property. The omission to do so may entitle the purchaser to avoid the contract; as, for example, where the house sold was overlapped by an adjoining building in a manner which could not be detected by an inspection of the premises, or of the plan produced at the sale: *Pope* v. *Garland*, 4 Y. & C. Ex. 394, 403.

So, where property was described as "eligible for building purposes," and certain water rights of adjoining owners materially interfered with such an application of the land, the vendor's bill for specific performance was dismissed with costs: *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609. See *Brewer* v. *Brown*, 28 Ch. D. 309.

Notice of latent defect.

A purchaser who has knowledge or notice of a latent defect cannot insist that he was misled by an omission to mention it: *Barraud* v. *Archer*, 2 Sim. 433; *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1. In *Shackleton* v. *Sutcliffe* (*supra*) it was argued that the purchaser, who lived in the neighbourhood, and constantly passed the wells which were supplied from the upper land, was affected with notice of the easements; but it seems to have been considered that knowledge of the physical condition of the property did not give notice of the incorporeal rights.

Ambiguous description.

A description which admits of two meanings will amount to a misdescription if the purchaser is actually misled by it: *Swaisland* v. *Dearsley*, 29 Beav. 430. See also *Leyland* v. *Illingworth*, 2 De G. F. & J. 248.

But if the purchaser knows the real facts before he buys, he has no ground of complaint: *Farebrother* v. *Gibson*, 1 De G. & J. 602; *Carroll* v. *Keayes*, Ir. R. 8 Eq. 97.

Sect. 2.—*Effect of Misdescription.*

Effect of misdescription on the contract at law.

Any misdescription, however trivial, was considered fatal to the validity of the contract in the old common law courts, on the ground that, the subject-matter of the contract as described being non-existent, there was really no contract between the parties. When the vendor had not the exact interest which he contracted to sell, the buyer might consider the contract as at an end: *Farrer* v. *Nightingal*, 2 Esp. 639. See, however, *Balworth* v. *Hassell*, 4 Camp. 140.

In equity.

The courts of equity, on the other hand, regarding the spirit rather than the letter, interfered at an early period to prevent the rigid rule of law from working injustice; and undertook in each case to determine whether the mistake or inaccuracy was such as to admit of compensation, or was so serious as to avoid the contract. See *Mortlock* v. *Buller*, 10 Ves. 292, 306.

Judicature Acts.

Now that the rules of equity prevail in all the Courts, the common law rule may be regarded as obsolete, and whether the action be for a return of the deposit, or for damages in the Queen's Bench Division, or for specific performance, or rescission in the Chancery Division, the question whether the contract is avoided by misdescription must in all cases be determined on the same principles. But specific performance being a discretionary jurisdiction, the Court may decline to enforce the contract without deciding that it is actually void; and, as the misdescription is the fault of the vendor, will often assist a purchaser who comes for specific performance with compensation, where, in the same circumstances, relief would be denied to the vendor.

Principle of compensation.

Lord Erskine thus states the principle upon which the equitable jurisdiction as to compensation was exercised: "Where," he says, "advantage is taken of a circumstance, that does not admit a strict performance of the contract, if the failure is not substantial, equity will interfere. If, for instance, the contract is for a term of ninety-nine years in a farm, and it appears that the vendor has only ninety-eight or ninety-seven years, he must be non-suited in an action; but equity will not so deal with him; and if the other party can have the substantial

Ch. XXV. s. 2.

benefit of his contract, that slight difference being of no importance to him, equity will interfere. Thus was introduced the principle of compensation, now so well established—a principle which I have no disposition to shake:" *Halsey* v. *Grant*, 13 Ves. 73, 77.

Principle not to be extended.

It will be noticed that Lord Erskine's statement of the principle of compensation is qualified by the important limitation, that the other party is to have *the substantial benefit of his contract;* but this consideration has not been always kept in view by the Courts. For "under the head of specific performance, contracts substantially different from those entered into have been enforced. In the case of a contract for a house and a wharf, the object of the purchaser being to carry on his business at the wharf, it was considered that this Court was specifically performing that man's contract by giving him the house without the wharf." Per Lord Eldon, *Drewe* v. *Hanson*, 6 Ves. 675, 678. See *Stewart* v. *Alliston*, 1 Mer. 26, 32. In this passage Lord Eldon also refers to a case of *Shirley* v. *Davis*, in which the purchaser was obliged to take a house in Kent (on the north side of the Thames), although his object in purchasing was to be a freeholder of Essex. See, however, as to this case, *Shirley* v. *Stratton* (1 Bro. C. C. 440), from the note to which it appears that Lord Eldon was mistaken in his recollection of the case.

Sir G. Jessel, M. R., has, in a recent case, in language almost identical with Lord Eldon's, protested against the undue extension of the principle of compensation. See *Cato* v. *Thompson*, 9 Q. B. D. 616, 618.

Vendor's claim for compensation.

The vendor cannot, in the absence of stipulation, recover compensation if the property is more valuable than it was described to be.

Thus, where premises were sold for the remainder of a term, of which both parties believed there were only eight years unexpired, and it turned out that there were in fact twenty years, the vendor's bill asking for a re-assignment of the premises for the extra years was dismissed: Lord Cottenham, L. C., observing: "Suppose a party proposed to sell a farm, describing it as 'all my farm of 200 acres,' and the price was fixed on that sup-

position, but it afterwards turned out to be 250 acres, could he afterwards come and ask for a reconveyance of the farm, or payment of the difference? Clearly not, the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term, or a larger acreage, is immaterial:" *Okill* v. *Whittaker*, 2 Ph. 338. But under a special condition the vendor may obtain compensation: *Leslie* v. *Tompson*, 9 Hare, 268.

But where the property was described as containing "forty acres or thereabouts, be the same more or less," and the contract provided that if "any mistake or omission be made in the description of the property" a compensation or allowance should be made, the vendor was compelled to complete without compensation for 1a. 1r. 10p., by which the true acreage was found to exceed that stated in the particulars: *Re Orange*, W. N. 1885, 72.

No indemnity,

The Court cannot compel the purchaser to take an indemnity, or the vendor to give it: *Balmanno* v. *Lumley*, 1 Ves. & B. 224. See also *Wood* v. *Bernal*, 19 Ves. 220; *Fildes* v. *Hooker*, 3 Mad. 193; *Nouaille* v. *Flight*, 7 Beav. 521; *Ridgway* v. *Gray*, 1 Mac. & G. 109; *Bainbridge* v. *Kinnaird*, 32 Beav. 346. Unless, indeed, the parties expressly or by implication contract for a covenant of indemnity: *Aylett* v. *Ashton*, 1 My. & Cr. 105.

unless it is part of the contract.

This seems to have been the ground of decision in *Milligan* v. *Cooke* (16 Ves. 1), where Lord Eldon directed that, if the difference in value between the interest described in the particulars of sale, and that which the vendor had to give could not be ascertained, the purchaser should have an indemnity, which should not be a personal indemnity, but by way of security upon real estate, or by part of the purchase-money being kept in Court. See *Paton* v. *Brebner*, 1 Bli. 42, 67.

Exception.

In one case, indeed, Lord Hatherley (then Sir W. P. Wood, V.-C.) seems to have departed from the principle that a vendor could not be compelled to give an indemnity; for where the vendor's wife refused to release her dower, he ordered part of the purchase-money to be retained in Court, to answer her contingent claim to dower in the event of her surviving her husband: *Wilson* v. *Williams*, 3 Jur. N. S. 810. See also

Ch. XXV. s. 2.

Powell v. *South Wales Ry. Co.*, 1 Jur. N. S. 773, where compensation in money was combined with an indemnity by way of covenant.

Right of the purchaser to bring action.

The purchaser's rights in cases of misdescription are not confined to compensation. He may also, at least where the defect is so grave that the vendor cannot enforce specific performance with compensation,—

(1) Repudiate the contract and recover his deposit; or

(2) Rely on the contract, and obtain damages in an action, founded on the breach of the stipulation descriptive of the property.

Hewitt, v. Walker W. N. 85 p. 151.

Action for deposit.

With reference to the first of these remedies it is unnecessary to consider it in this chapter; for the issue in such an action seems to be identical with that in the vendor's action for specific performance with compensation. The vendor can, in fact, counterclaim for such relief, and the purchaser's action, if brought in the Queen's Bench Division, will then in most cases be transferred to the Chancery Division: *Holloway* v. *York*, 2 Ex. D. 333; *London Land Co.* v. *Harris*, 13 Q. B. D. 540; and see *Hillman* v. *Mayhew*, 1 Ex. D. 132; *Storey* v. *Waddle*, 4 Q. B. D. 289.

Action for breach of contract.

The second remedy above mentioned, *i. e.* the common law action for breach of contract, is not usually resorted to, except after the execution of the conveyance, when the remedy by specific performance has become impossible; and, indeed, after the completion of the contract the purchaser can rarely recover damages for misdescription.

Action founded on contract.

Fraud being supposed to be absent, the action is founded simply upon the contract; and, if there be no stipulation as to compensation for misdescription, the purchaser cannot recover damages: *Joliffe* v. *Baker*, 11 Q. B. D. 255. *A fortiori* where there is a condition that no compensation shall be allowed: *Brett* v. *Clowser*, 5 C. P. D. 376.

When articles merged in deed.

As long ago as the reign of Charles II. it was laid down "that the articles were only a security and preparatory to the conveyance, and the purchaser having afterwards taken a conveyance, shall not resort to the articles, or to any particular, or to any averment or communication afterwards, for such things

shall never be admitted against the deed:" *Twyford* v. *Wareup*, Finch, 310. See also *Leggott* v. *Barrett*, 15 Ch. D. 306, at pp. 309, 311; *Teebay* v. *Manchester, &c. Ry. Co.*, 24 Ch. D. 572.

But where there is a clause expressly providing that compensation shall be given for any error in the particulars, a misdescription confers upon the purchaser a right of action, which is not destroyed by taking a conveyance: *Cann* v. *Cann*, 3 Sim. 447; *Bos* v. *Helsham*, L. R. 2 Ex. 72.

Conflicting decisions.

The question whether the purchaser can obtain compensation after completion has given rise to some conflict of authority; but it may be regarded as now settled in favour of the purchaser by the decision of the Court of Appeal in *Palmer* v. *Johnson*, 13 Q. B. D. 351, approving *Cann* v. *Cann*, 3 Sim. 447; *Bos* v. *Helsham*, L. R. 2 Ex. 72; *Re Turner and Skelton*, 13 Ch. D. 130; and overruling *Manson* v. *Thacker*, 7 Ch. D. 620; *Besley* v. *Besley*, 9 Ch. D. 103; *Allen* v. *Richardson*, 13 Ch. D. 524.

Some clauses of the agreement may remain in force after the conveyance.

The cases cited above show that there may be clauses in the agreement which the parties intend to operate after the execution of the conveyance. It is in each case a question of construction, whether the particular clause is merged or not. In the case of *Re Turner and Skelton*, for example, where the purchaser claimed compensation for the difference between 6a. 2r. 10p., and 5a. 0r. 7p., it is not stated in the report whether the conveyance described the property by its true acreage; and it is presumed that it did not. For if the true acreage had been there stated, the misdescription would have been cured, and the purchaser would not have been allowed to go behind the description in the deed. In the other cases cited above, the defect was one which would not be usually noticed in the conveyance. See *Re Perriam* (32 W. R. 369), where, after a conveyance of the property by its correct description, compensation was allowed, the purchase-money being still in Court.

Incumbrances and defects in title.

It is clear that incumbrances and defects in *title* do not fall within the usual condition as to compensation, and after conveyance the purchaser, as to them, is without remedy, except under the covenants in the conveyance: *Anon.*, 2 Freem. 106; *Thomas* v. *Powell*, 2 Cox, 394; *Ex parte Riches*, 27 S. J. 313.

Sect. 3.—*Assessment of Compensation.*

Difficulty in fixing compensation.

There is considerable difficulty, except in simple cases, in fixing the amount of the compensation which should be made by the vendor for an error of description, or a defect in the property; a difficulty, indeed, which sometimes interposes an insuperable bar to specific performance of the contract. See *Westmacott* v. *Robins*, 4 De G. F. & J. 390.

Different positions of vendor and purchaser.

The Court will endeavour to ascertain, at the instance of the purchaser, the money value of a defect, when it would decline to do so at the request of the vendor; for the vendor cannot be heard to suggest the difficulties which he has occasioned: *Thomas* v. *Dering*, 1 Keen, 729, 746. See *Western* v. *Russell*, 3 Ves. & B. 187, 192.

Quantity.

As a general rule, a deficiency in quantity will be compensated by a rateable abatement of price. Thus where the property is described as containing a certain number of acres, and it turns out that there is a deficiency, the compensation is calculated by the simple sum in the rule of three—as the area mentioned in the particulars is to the deficiency, so is the purchase-money to the compensation. See *Durham* v. *Legard*, 34 Beav. 611.

Exception.

But this rule does not hold good if the property is not of uniform quality. For where the price was fixed mainly with reference to the value of the timber, and the deficiency in acreage was attributed to untimbered land, the compensation was ascertained, not by a rateable deduction, but by a proportional abatement excluding the value of the trees: *Hill* v. *Buckley*, 17 Ves. 394. See also *Leslie* v. *Tompson*, 9 Hare, 268.

Lease.

When the contract is for a lease, and there is a deficiency in area, the rent will be rateably reduced: *McKenzie* v. *Hesketh*, 7 Ch. D. 675.

Length of term.

When the defect is not in the area of the property, but in the duration of the vendor's interest, the calculation is not so simple. If, for example, a term of years is shorter than was stated in the particulars, the loss to the purchaser is only at the further end of the term, and must be measured by the present value of a postponed annuity, equal in amount to the net profits of the land, the duration of such annuity being the period between the

termination of the lease and the time when it would have terminated according to the particulars.

Arbitrary determination.

A term instead of being defective by a definite number of years, may be determinable at the will of a third person; and then it seems the compensation does not admit of calculation. See *Brewer* v. *Broadwood*, 22 Ch. D. 105.

Right of renewal.

Where a leasehold interest was erroneously described as renewable every twenty-one years on payment of the customary fine, and it proved to be held only for the residue of a term of twenty-one years, without any customary right of renewal, a reference was, at the request of the purchaser, directed to ascertain the compensation: *Painter* v. *Newby*, 11 Hare, 26. See also *Milligan* v. *Cooke*, 16 Ves. 1; and *Dale* v. *Lister*, cited 16 Ves. 7, 10.

In one case it was referred to the Master to ascertain the difference in value between a legal term of thirty-one years and a legal term of twenty-one years with an equitable term of ten years superadded: *Hanbury* v. *Litchfield*, 2 Myl. & K. 629.

Undivided shares.

The principle of proportional abatement is applicable when the vendor has a smaller share than he contracted to sell (*Jones* v. *Evans*, 17 L. J. Ch. 469), and also when he has only an undivided share, instead of the entirety: *Hooper* v. *Smart*, L. R. 18 Eq. 683; *Hardy* v. *Eckersley*, W. N. 1877, 199; *Horrocks* v. *Rigby*, 9 Ch. D. 180; *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236; *Burrow* v. *Scammell*, 19 Ch. D. 175; *English* v. *Murray*, 32 W. R. 84.

Life estate and reversion.

The difference in value between a life estate and a fee simple admits of actuarial valuation, according to the tables of the expectation of life. Thus, when the contract is for the sale of the fee simple, and the vendor has only an estate for his life (*Barnes* v. *Wood*, L. R. 8 Eq. 424), or an estate in remainder, subject to a life estate (*Nelthorpe* v. *Holgate*, 1 Coll. 203; *Barker* v. *Cox*, 4 Ch. D. 464), or an estate subject to the possible dower of his wife (*Wilson* v. *Williams*, 3 Jur. N. S. 810), the compensation may be ascertained. *Secus*, if the vendor has, besides his life interest, a reversion in fee expectant on his death without issue: *Thomas* v. *Dering*, 1 Keen, 729.

So, if a reversion be sold and there is a mistake in the age

Ch. XXV. s. 3.

of the life on which it depends, the difference of value may be computed; but where there is an additional contingency, such as the birth of future children, the difference of age alters the likelihood of that contingency, and in such a case, therefore, no estimate can possibly be made of the difference of value between the thing described and the thing sold: per Lord Tenterden, C. J., *Sherwood* v. *Robins*, M. & M. 194. See also *Baker* v. *Bent*, 1 Russ. & M. 224.

Annual value.

Where the net income of large mineral properties and coal works was overstated, in consequence of the annual consumption of stores being taken at too low a figure, the abatement proper to be made was elaborately discussed in *Powell* v. *Elliott*, L. R. 10 Ch. 424.

The purchase-money, in that case, was supposed to have been fixed on the basis of the net annual profits, coupled with the duration of the lease; and on this assumption the reduction was ascertained by the following proportion: as the net income is to the agreed purchase-money (after deducting the present value of the plant, to be realized at the abandonment of the collieries), so is the amount by which the income was overstated to the capital sum to be deducted.

Rental.

Whenever the rental is overstated, the compensation would seem to be determinable on the same principle.

Rentcharge.

If the property is subject to a perpetual rent-charge not disclosed in the contract, the compensation should be the capitalized value of the rent-charge. See the Conveyancing Act, 1881, s. 5.

Tenure.

Differences of tenure do not in general admit of valuation. But where, on a sale of land as freehold which turned out to be copyhold, the rents, fines and heriots in the manor were fixed and certain and of nominal value, and the mines and minerals, timber and other trees, belonged to the tenant, it was held that the difference in value was trivial and might be compensated: *Price* v. *Macaulay*, 2 De G. M. & G. 339.

Right of sporting.

It has been doubted whether the reservation of a right of sporting could be valued: *Burnell* v. *Brown*, 1 J. & W. 168, 172.

Size of timber.

A contract for the sale of a timber estate overstated the average size of the trees, but made no mention of their number,

or of the total quantity of timber which they contained. It was held that it was not a case in which the Court could measure the extent of the deficiency, or ascertain the amount of compensation: *Lord Brooke* v. *Rounthwaite*, 5 Hare, 298.

Fines, arbitrary or fixed.

On the sale of a manor the fines were described as arbitrary; they were, in fact, fixed by custom, save in the case of alienation. The difference in value was considered not to be ascertainable: *White* v. *Cuddon*, 8 Cl. & F. 766.

Names of lessees.

Where the misdescription consisted in stating erroneously that the premises were in the occupation of certain persons as lessees, it was held that the case was not one for compensation: *Ridgway* v. *Gray*, 1 Mac. & G. 109. See *Farebrother* v. *Gibson*, 1 De G. & J. 602.

Incidence of charge.

So, where redeemed land tax, the subject-matter of the contract, was stated to be charged on three houses, and it consisted of three sums, each charged separately on one of the houses, it was held not to be a subject of compensation, inasmuch as the security was diminished, and the cost of collection increased: *Cox* v. *Coventon*, 31 Beav. 378.

Add: Ashley; Chetwind v. Watson, W.N. 88 p. 206.

Sect. 4.—*Vendor's Action.—Specific Performance without Compensation.*

No misdescription.

The question of the accuracy of the description must be decided in each case on its own circumstances; and, if the Court comes to the conclusion that there is no misdescription, the vendor can enforce specific performance without compensation.

Situation.

Thus, where a house was sold as 39, Regency Square, Brighton, and, although so numbered, it was not situated in the square but in one of the outlets from it, the purchaser was compelled to complete: *White* v. *Bradshaw*, 16 Jur. 738. Compare with this case, *Stanton* v. *Tattersall* (1 Sm. & G. 529), where the property was described in the following terms: "A freehold estate, being No. 58, on the North side of Pall Mall, opposite Marlborough House, a substantial edifice, &c." The house was,

in fact, not in Pall Mall, but behind No. 57, and was approached by a long passage through the ground floor of No. 57, only 3 ft. 8 in. wide. Vice-Chancellor Stuart considered that the objection, if taken in time, would have prevailed, but that the purchaser had waived his right to rescind on this ground. The contract was, however, set aside on another objection.

Length of term.

So, where lands were described as held under a lease for three lives and thirty-one years, it was held that there was no misdescription, although the years were concurrent with the lives, and not in reversion, to commence after the dropping of the last life: *Vignolles* v. *Bowen*, 12 Ir. Eq. Rep. 194.

Sale plan.

An estate was sold by auction in lots, one of which was bought by the plaintiff. The sale plan, by dotted lines, showed a connexion between this lot and a well and reservoir on other lots. The latter were conveyed without any reservation of the water rights, and the plaintiff claimed compensation for their loss. Specific performance without compensation was, however, decreed, on the ground that the sale plan was merely tantamount to a view of the property, and did not import any representation as to the rights of the purchasers *inter se*: *Fewster* v. *Turner*, 6 Jur. 144.

Substantial and convenient.

The words "substantial and convenient," have been held not to be a misdescription of a house, whose walls were in some places only half a brick thick, and were traversed by some "trivial" cracks: *Johnson* v. *Smart*, 2 Giff. 151. See also p. 369.

Purchaser misled by his knowledge of the premises.

A purchaser cannot resist specific performance when he is misled, not by the description in the particulars, but by his own knowledge of the property, from which he inferred that all the premises in the occupation of the tenants were being sold: *Tamplin* v. *James*, 15 Ch. D. 215.

Subject to determinable lease.

Property subject to a lease for twenty-one years, determinable by the lessee at the end of seven or fourteen years, was sold without mention of the lease being so determinable. In the absence of evidence of damage, this was held not to be a misdescription: *Goddard* v. *Jeffreys*, 30 W. R. 269.

Copyhold equal in value to freehold.

A description of freehold property, as "copyhold of inheritance, at a small quit-rent and fine certain, which renders it equal in value to freehold," would not, it seems, afford a

ground for successfully resisting specific performance: *Twining* v. *Morrice*, 2 Bro. C. C. 326.

"More or less."

No compensation will be allowed for small errors of quantity when such words as "by estimation," "more or less," &c., are added to the description. See *Twyford* v. *Wareup*, Finch, 310; *Townshend* v. *Stangroom*, 6 Ves. 328, 341; *Winch* v. *Winchester*, 1 Ves. & B. 375 (where the deficiency amounted to five acres out of forty-one); *Nicoll* v. *Chambers*, 11 C. B. 996; *Re Orange*, W. N. 1885, 72. Where a farm was described as "containing by estimation 349 acres, or thereabouts, be the same more or less," with a stipulation that the premises should be taken at the quantity stated, whether more or less, and it turned out that the word "acres" was used in the sense of customary, not statute acres, thereby causing a deficiency of 100 acres, Lord Eldon, C., said: "I never can agree that such a clause would cover so large a deficiency in the number of acres as is alleged to exist here": *Portman* v. *Mill*, 2 Russ. 570, 575. See also *Cordingley* v. *Cheeseborough*, 4 De G. F. & J. 379; *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.

Knowledge and notice.

An actual misdescription without fraud is (as has been already stated, *ante*, p. 349) cured by the purchaser's *knowledge* of its falsehood. Silence as to a defect, which the vendor ought to have disclosed, may be remedied by *constructive notice* of its existence.

Constructive notice does not control express statements.

The doctrine of constructive notice will not be applied when an express representation is made to the purchaser; for he is in such a case entitled to rely on the representation, and need inquire no further: *Van* v. *Corpe*, 3 Myl. & K. 269; *Drysdale* v. *Mace*, 2 Sm. & G. 225; *Camberwell Building Society* v. *Holloway*, 13 Ch. D. 754, 762; and see *Jones* v. *Rimmer*, 14 Ch. D. 588. So, reading the lease at the auction is no excuse for a misdescription of the terms of the lease in the particulars: *Jones* v. *Edney*, 3 Camp. 285; *Flight* v. *Booth*, 1 Bing. N. C. 370. But an inspection of the lease by the purchaser seems to bind him by notice: *Paterson* v. *Long*, 6 Beav. 590.

Notice through an Act of Parliament.

A local but public Act of Parliament has been held to fix a purchaser with notice of certain taxes imposed by it. The estate in this case was described as "fen-land," and was charged

Ch. XXV. s. 4.

by a local public Act with drainage and embanking taxes, of which the purchaser had no express notice. He was, however, compelled to complete without compensation: *Barraud* v. *Archer*, 2 Sim. 433; affirmed on appeal, 2 Russ. & M. 751. See also *Re Ryan's Estate*, Ir. R. 3 Eq. 255.

Leases.

The purchaser has in several cases been fixed with constructive notice of the terms of leases. The rule has been thus stated by Sir William Grant, M.R.: "When a lease is stated, it is the business of the party to look at it, and to see whether there is any covenant that may materially influence his judgment as to the value. If the circumstance that the land was in lease had been concealed, that would be a different consideration; but, upon analogy to other cases, if the party has notice that the estate is in lease, he has notice of everything contained in the lease": *Hall* v. *Smith*, 14 Ves. 426, 433. See *Martin* v. *Cotter*, 3 J. & Lat. 496, 506; *Vignolles* v. *Bowen*, 12 Ir. Eq. Rep. 194; *Grosvenor* v. *Green*, 5 Jur. N. S. 117.

Sale of lease.

The same rule holds good where it is the leasehold interest which is sold: *Pope* v. *Garland*, 4 Y. & C. Ex. 394; *Spunner* v. *Walsh*, 10 Ir. Eq. Rep. 386.

Underlease.

So upon an agreement to take an underlease, it is the duty of the underlessee to inform himself of the covenants which are contained in the original lease, and if he enters and takes possession of the property he is bound by those covenants: *Cosser* v. *Collinge*, 3 Myl. & K. 283; *Hyde* v. *Warden*, 3 Ex. D. 72.

Usual covenants.

But whether the doctrine of constructive notice extends beyond the *usual* covenants was doubted in *Flight* v. *Barton*, 3 Myl. & K. 282. See, however, *Grosvenor* v. *Green*, 5 Jur. N. S. 117.

Difference between a grant and an assignment.

There is a difference between a contract to grant a lease, and a contract to sell a lease. In the former case only the usual covenants can be insisted on; but the sale of an existing leasehold interest is a different thing, and it is not to be understood that the lease contained only the usual covenants—per Fry, J., in *Flood* v. *Pritchard*, 40 L. T. 873.

Sale of leasehold in lots.

Where premises comprised in one lease were sold in lots, the whole rent being thrown upon one lot, the purchasers of the

others were held to have constructive notice of the clause of re-entry in the original lease, and to have bought subject to the rights of the lessor over the whole property: *Walter* v. *Maunde*, 1 Jac. & W. 181; *Paterson* v. *Long*, 6 Beav. 590. See *Brumfit* v. *Morton*, 3 Jur. N. S. 1198; *Sheard* v. *Venables*, 36 L. J. Ch. 922.

Occupation not notice of lease.

The fact that the property is stated to be in the occupation of tenants, does not put a purchaser upon inquiry so as to fix him with notice of the terms of the tenancies: *Caballero* v. *Henty*, L. R. 9 Ch. 447, overruling some of Lord Romilly's *dicta* in *James* v. *Lichfield*, L. R. 9 Eq. 51. See also *Nelthorpe* v. *Holyate*, 1 Coll. 203; *Hughes* v. *Jones*, 3 De G. F. & J. 307.

Notice of tenancy bars claim to vacant possession.

A purchaser who knows that the land is occupied by tenants cannot, of course, object on the ground that he does not obtain vacant possession: *Carroll* v. *Keayes*, Ir. R. 8 Eq. 97. The remarks of the judges in this case seem to have gone further than was necessary for the actual decision, which, notwithstanding *Caballero* v. *Henty*, may be supported on the ground that there is a distinction between knowledge of the fact of physical occupation, and constructive notice of the claims of a tenant.

Constructive notice of slight defects.

"The view which the Courts of Equity have taken of cases of undisclosed rights of tenants, as between vendor and purchaser, in the absence of fraud or misrepresentation, appears to be this:—If those undisclosed rights are trifling in their character, and the purchaser might with a little exertion have discovered them, the Court will grant specific performance against him without compensation. If such rights are more important, or there are any circumstances which would make it a case of hardship on the purchaser to enforce the contract, the Court will hold its hand, and refuse specific performance, unless compensation is consented to by the vendors"—per Amphlett, B.: *Phillips* v. *Miller*, L. R. 10 C. P. 420, 427.

Waiver.

The purchaser may lose his right to compensation by waiver.

After the delivery of an abstract, disclosing a reservation of sporting rights which was not mentioned in the particulars, the purchaser took possession; and, for some months, made no claim in respect of the reservation, which, it seems, he knew to be irremovable. He was held to have waived the objection, and lost his right to compensation: *Burnell* v. *Brown*, 1 Jac. & W.

Ch. XXV. s. 4.

168. See also *Fordyce* v. *Ford*, 4 Bro. C. C. 494; *Martin* v. *Cotter*, 3 J. & Lat. 496, 506.

But taking possession is not conclusive; and, if negotiations for a compromise are subsequently carried on, the right to compensation will not be affected by possession: *Calcraft* v. *Roebuck*, 1 Ves. jun. 221.

The purchaser's conduct, however, may be such as to prevent his getting rid of the purchase, yet not preclude him from compensation, or, in other words, the purchaser may waive the objection to title without losing his right to compensation: *Hughes* v. *Jones*, 3 De G. F. & J. 307.

Effect of condition against compensation.

A condition is not unusually inserted that the property shall be taken to be correctly described; and if any error, misstatement or omission in the particulars shall be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendor or purchaser in respect thereof. But such a condition does not, it seems, enable a vendor to enforce specific performance without compensation where there is a large deficiency, as for example 180 out of 753 square yards: *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.

Terry & White's Contract 32 Ch. D. 14.

As to the effect of a condition allowing compensation, see *post*, p. 366.

Sect. 5.—*Vendor's Action.—Specific Performance with Compensation.*

Requisites for specific performance.

In order that the vendor may be able to enforce specific, or more properly partial, performance (*Graham* v. *Oliver*, 3 Beav. 124, 128), with compensation for a defect in the property, three things must concur; viz. (1) the conduct of the vendor must be not only free from fraud, but must be *optimæ fidei*; (2) the purchaser, notwithstanding the defect, must get substantially what he contracted for; and (3) the defect must be capable of valuation, as to which see *ante*, p. 356 *et seq.*

Fraud.

The first of these conditions calls here for but slight remark. "The principle on which performance of an agreement is com-

pelled, requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame. Misrepresentation, even as to a small part only, prevents him from applying here for relief:" *Clermont* v. *Tasburgh*, 1 Jac. & W. 112, 119.

Where an important fact is untruly represented, the inaccuracy of which representation was known to the person making it, it must, in the view of a Court of Equity, be considered as a fraud. On this principle it was held, where a reservoir and waterworks were described as yielding a rental of about 60*l*., which on inquiry turned out to be dependent for its continuance on the will of a third person in permitting the pipes to traverse his ground, that the vendor could not enforce specific performance: *Price* v. *Macaulay*, 2 De G. M. & G. 339.

When specific performance decreed.

The Court will decree specific performance with compensation at the suit of the vendor, only when the purchaser can get substantially and materially the property which he contracted to buy. See *Knatchbull* v. *Grueber*, 3 Mer. 124, 146; *Flight* v. *Booth*, 1 Bing. N. C. 370, 377; *Re Arnold*, 14 Ch. D. 270.

This principle will be applied in the following cases:—

i. Deficiency in quantity.

1. Where there is a small deficiency in quantity. See *Hill* v. *Buckley*, 17 Ves. 394; *King* v. *Wilson*, 6 Beav. 124; *Cordingley* v. *Cheeseborough*, 4 De G. F. & J. 379, 386; *Re Arnold*, 14 Ch. D. 270, 283.

ii. Title to part.

2. Where the vendor fails to make a title to a small part, which is not material to the possession and enjoyment of the rest of the property: *M'Queen* v. *Farquhar*, 11 Ves. 467. See also *Calcraft* v. *Roebuck*, 1 Ves. jun. 221; *Scott* v. *Hanson*, 1 Russ. & M. 128.

iii. Length of term.

3. Where there is a slight deficiency in the length of the term which the vendor has contracted to sell: *Halsey* v. *Grant*, 13 Ves. 73, 77. See *post*, p. 372.

If the report of *Forrer* v. *Nash*, in 35 Beav. 167, be correct, Lord Romilly, M. R., seems to have considered the difference between twenty and twenty-one years a bar to specific performance of a contract to grant a lease for the latter term. See, however, the reports of this case in 14 W. R. 8, and 11

Ch. XXV. s. 5.

Jur. N. S. 789, where no stress is laid on the deficiency of a year.

Even at common law, where the vendor sold an unexpired term of eight years and had only seven years and seven months, he obtained a verdict in an action for damages against the purchaser for refusing to complete: *Belworth* v. *Hassell*, 4 Camp. 140.

iv. Quit rents and rent-charges.

4. Quit rents and rent-charges of small amount are subjects of compensation: *Esdaile* v. *Stephenson*, 1 Sim. & St. 122. This was first allowed in the case of quit rents, because they were incidents of tenure; and Sir J. Leach, V.-C., in this case seems to regret that the rule was ever extended to rent-charges, which are not incidents of tenure, but are created by the voluntary act of the vendor, or those under whom he claims.

Quit rents, chief rents, rent-charges and other annual sums issuing out of land are now, in some cases, redeemable (Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 45); and where this is the case, it is conceived that rent-charges, whatever may be their amount, are fitting subjects of compensation. See also sect. 5 of the same Act.

Effect of condition as to compensation.

The usual condition, that errors of description shall not annul the sale, but that compensation shall be allowed, does not seem to enlarge the right of the vendor to compel specific performance in cases which do not fall under the general head of equity. For such a condition is construed strictly against the vendor when he seeks specific performance (*Cordingley* v. *Cheeseborough*, 4 De G. F. & J. 379, 384), and does not apply to errors which are either gross or intentional: *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; *Stewart* v. *Alliston*, 1 Mer. 26; *Robinson* v. *Musgrove*, 2 M. & Rob. 92.

If, then, the defect be trivial, compensation will be allowed, either under the condition or under the discretionary jurisdiction of the Court; and if it be serious, the principle of compensation will not be applied, whether there is or is not a condition on the subject.

A condition which excludes compensation altogether, will not enable a vendor to compel specific performance when the defi-

ciency is considerable: *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.

Where, however, the purchaser enters into a contract which provides for compensation being made for defects, and the existence of a certain defect is suspected at the date of the contract, the condition will have a material bearing on the question, whether specific performance should be enforced against the purchaser, with compensation for the defect which was previously suspected, and afterwards became known: *English* v. *Murray*, 32 W. R. 84. See also *Lett* v. *Randall*, 49 L. T. 71.

SECT. 6.—*Vendor's Action.—Specific Performance Refused.*

Principle stated.

The principle on which specific performance with compensation rests is, "that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have": per Lord Eldon, *Knatchbull* v. *Grueber*, 3 Mer. 124, 146.

The Court will not, whether there is or is not a condition as to compensation, make what is in effect a new contract between the parties, by giving the purchaser something substantially and materially different from what he bought, together with compensation for the difference: *Re Arnold*, 14 Ch. D. 270.

Classification of cases in which specific performance refused.

The cases in which the vendor has been refused specific performance, even on payment of compensation, on the ground of a defect in the subject-matter of the contract, may be conveniently considered in three classes, as follows:—

1. Defects in quantity;
2. Defects in the nature of the property;
3. Defects in the estate or interest of the vendor.

Defects in quantity.

As to defects in quantity, it is clear that a considerable deficiency in acreage is a ground for refusing specific performance, even when there is an express stipulation that the premises shall be taken at the quantity stated: *Portman* v. *Mill*, 2 Russ. 570;

Ch. XXV. s. 6.

Aberaman Iron Works v. *Wickens*, L. R. 4 Ch. 101. See also cases cited *ante*, p. 361.

Even a slight deficiency, if it materially affects the utility of the property, will avoid the contract, notwithstanding a condition as to misdescription. Thus, where a wharf was described as having a water frontage of about sixty feet, and in fact had only fifty, it was held to be no case for compensation, on the ground that the length of an ordinary barge being sixty feet, it could not be loaded or unloaded conveniently at a wharf with less than sixty feet frontage: *Re The Deptford Creek Bridge Co. and Bevan*, 28 S. J. 327.

No title to part.

In like manner, if the vendor is unable to make a title to some part of the property, which is essential to the enjoyment of the rest, he cannot enforce the contract. On this principle specific performance has been refused where no title could be shown to a small piece of land in close proximity to the park gates, which contained brick earth, and was, on that account, the more likely to be turned to obnoxious uses: *Knatchbull* v. *Grueber*, 1 Mad. 153; 3 Mer. 124; where the property sold consisted of a wharf and jetty, but the jetty was liable to removal by the Corporation of London: *Peers* v. *Lambert*, 7 Beav. 546; where four and a half out of thirty acres were prejudicially affected by easements: *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; where no title could be made to a long narrow strip of land lying between the house and the high road: *Perkins* v. *Ede*, 16 Beav. 193; and where a material portion of the property (the stable and coach-house), was described as held under a lease, and turned out to be comprised with other property in a superior lease, the purchaser was held entitled to rescind the contract: *Turner* v. *Turner*, W. N. 1881, 70.

Failure of title to one of several lots.

Where the same person buys several lots at an auction, the question sometimes arises whether he can repudiate all his purchases if a good title is not made to one or more lots. The general rule governing purchases in lots is, that a separate contract exists as to each lot: *Emmerson* v. *Heelis*, 2 Taunt. 38; *James* v. *Shore*, 1 Stark. 426; *Roots* v. *Lord Dormer*, 4 B. & Ad. 77; *contra*, *Chambers* v. *Griffiths*, 1 Esp. 150. And in that event failure of title as to one lot does not prevent specific per-

formance as to the others: *Poole* v. *Shergold*, 2 Bro. C. C. 118; *Lewin* v. *Guest*, 1 Russ. 325. To this rule, however, there are two exceptions:—

(1.) Where the written agreement treats the two purchases as one contract for the purchase of both lots at the aggregate price: *Dykes* v. *Blake*, 6 Scott, 320.

(2.) Where the two lots are so intimately connected in use and enjoyment, that the purchaser must be supposed to have bought the one with reference to the other: *Casamajor* v. *Strode*, 2 Myl. & K. 706, 722; *Westhall* v. *Hall*, W. N. 1883, 158.

In these cases the contract cannot be enforced piecemeal.

Quality of the property.

Vague and indefinite statements as to the quality of the property ought to be treated by a purchaser only as a ground for inquiry; and will be disregarded by the Court in the vendor's action for specific performance: *Trower* v. *Newcome*, 3 Mer. 704; *Scott* v. *Hanson*, 1 Sim. 13; 1 Russ. & M. 128; *Johnson* v. *Smart*, 2 Giff. 151. So, nothing can be made of such puffing statements as, that "the house is fit for a respectable family:" *Magennis* v. *Fallon*, 2 Moll. 561, 589; or that "the land is fertile and improveable:" *Dimmock* v. *Hallett*, L. R. 2 Ch. 21. The maxim, *caveat emptor*, applies in these cases, and if a purchaser chooses to buy on the faith of such statements without inquiry, he has no ground of complaint: *Ibid.* at p. 27. But that maxim has no application where there is a positive representation essentially material to the subject in question, and which, at the same time, is false in fact: *Lowndes* v. *Lane*, 2 Cox, 363.

State of repair.

The vendor is not bound to particularize patent defects, as, for example, that a house is out of repair: *Dyer* v. *Hargrave*, 10 Ves. 505. But if he states that the property is in repair, the purchaser is entitled to rely upon it: *Grant* v. *Munt*, Coop. 173; and if the purchaser wanted immediate possession for the purposes of residence, he cannot be compelled to accept compensation: *Dyer* v. *Hargrave*, *supra*, at p. 508.

If the vendor states what is false in fact, that the premises have been recently put in repair, he cannot of course compel specific performance: *Loyes* v. *Rutherford*, cited Sug. V. & P. 331.

Ch. XXV. s. 6.

The purchaser recovered his deposit (and *à fortiori* specific performance at the suit of the vendor would be refused), where the vendor of a lease did not communicate the fact that he had received from his landlord a peremptory notice to repair: *Stevens* v. *Adamson*, 2 Stark. 422.

So, any artifice used by the vendor to conceal defects, or to prevent the purchaser from discovering them, would avoid the contract. See *Baglehole* v. *Walters*, 3 Camp. 154; *Schneider* v. *Heath*, *ibid.* 506.

Nuisance.

The existence of a nuisance, rendering a house unsuitable for a family residence, is a defect which the vendor ought to disclose. For if he remains silent knowing of this defect, which could not be discovered by a provident purchaser, it seems that the Court will not enforce the contract: *Lucas* v. *James*, 7 Hare, 410.

Situation.

A false description of the situation of the property precludes the vendor from enforcing specific performance. As when a house in the rear of No. 57, Pall Mall, and approached by a long and narrow passage from that street, was sold as "No. 58 on the north side of Pall Mall, opposite Marlborough House:" *Stanton* v. *Tattersall*, 1 Sm. & G. 529. See *White* v. *Bradshaw*, 16 Jur. 738.

No access to property.

And even where the contract was merely silent as to the defect, and it turned out that there was no means of access to the property, the purchaser was not compelled to complete: *Denne* v. *Light*, 8 De G. M. & G. 774.

Tenure.

Misdescription of the tenure of the property is, in general, fatal to the vendor's claim for specific performance.

Freehold and leasehold.

A man who has contracted for a freehold, cannot be compelled to take a leasehold estate. See *Fordyce* v. *Ford*, 4 Bro. C. C. 494; *Calcraft* v. *Roebuck*, 1 Ves. jun. 221; *Halsey* v. *Grant*, 13 Ves. 73, 78. Even though it be held for a mortgage term of 4,000 years foreclosed: *Drewe* v. *Corp*, 9 Ves. 368.

Long term.

But now such a term might be enlarged into a fee simple under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 65; and it is submitted that the vendor might, after the contract, effect this alteration of tenure, and force the property on the purchaser.

The vendor's action for specific performance was dismissed, where the agreement was for the purchase of lands and water rights in fee simple, and the water rights, which were essential to the enjoyment of the property, were held only for the residue of a term of 99 years: *Wright* v. *Howard*, 1 Sim. & St. 190.

Copyhold described as freehold.

The misdescription of copyhold as freehold was treated by Fry, J., in a recent case as a legal fraud; and the sale was set aside after conveyance: *Hart* v. *Swaine*, 7 Ch. D. 42; and see *Turner* v. *West Bromwich Union*, 9 W. R. 155.

Even without express mention of the tenure, a contract for a freehold will be implied from the use of the words "grant and convey;" and specific performance will be refused if part of the land turns out to be copyhold: *Hick* v. *Phillips*, Prec. in Ch. 575.

But where the difference in value was infinitesimal, the right to the timber and minerals being in the copyholder, specific performance was decreed: *Price* v. *Macaulay*, 2 De G. M. & G. 339.

Freehold described as copyhold.

It has been held that the vendor cannot compel the purchaser to accept freehold instead of copyhold, but this needs re-consideration: *Ayles* v. *Cox*, 16 Beav. 23.

If the vendor makes a mistake in describing his freehold property as copyhold, he cannot set up his own mistake as a ground for resisting specific performance. See *Twining* v. *Morrice*, 2 Bro. C. C. 326, 331.

Tenancies.

If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser of it; and the vendor cannot afterwards say to the purchaser, "If you had gone to the tenant and inquired, you would have found out all about it." Per Sir W. M. James, L. J., *Caballero* v. *Henty*, L. R. 9 Ch. 447. In this case the vendor's bill for specific performance was dismissed with costs, because the subject-matter of the contract—a public-house—was leased to a brewer; and the purchaser who was also a brewer could not use it for the purpose intended, namely, the sale of his own beer.

Adverse occupation not tenancy.

So, where property is described as in the occupation of a tenant at a certain rental, it is implied that he is a tenant for a

Ch. XXV. s. 6.

limited period to the *vendor* at the given rent; and if the tenant holds adversely to the vendor, refusing to give up possession, what is sold is a right of entry, and not the land, and the contract cannot be enforced: *Lachlan* v. *Reynolds*, Kay, 52.

Notice to quit.

If the terms of the tenancies are described, the purchaser is led to suppose that he is purchasing with continuing tenancies at fixed rents; and, if the tenants have given notice to quit, he will not, it seems, be held to his bargain: *Dimmock* v. *Hallett*, L. R. 2 Ch. 21, 28. Seems, if informal notice Davenport v. Charsley W. N. 1876 p. 25

Names of lessees.

The Court may refuse to enforce the contract, or even rescind it, where the particulars contain a false statement as to the persons who are lessees of the property: *Farebrother* v. *Gibson*, 1 De G. & J. 602; and see *Ridgway* v. *Gray*, 1 M. & G. 109.

Difficulty in estimating compensation.

"It is more easy to compute a just compensation, when it is to be given for the defect in the quantity or the quality of the land sold, than when it is to be given for the deficiency of the vendor's interest." Per Lord Langdale, M. R., *Thomas* v. *Dering*, 1 Keen, 729, 746.

Variance in subject-matter of sale.

Besides the difficulty of estimating the amount of compensation, there is another obstacle to specific performance at the suit of the vendor, where he has misdescribed his interest in the property; namely, that he cannot compel the purchaser to accept something essentially different from that which he bought. And, on this ground, a serious defect in the estate or interest of the vendor is, in general, a bar to the vendor's action for specific performance.

Life estate —reversion.

Thus a person who contracts for the purchase of an estate in fee simple in possession cannot, of course, be compelled to take either an estate for life (see *Ex parte Riches*, 27 S. J. 313), or the reversion subject to an estate for life. See *Collier* v. *Jenkins*, Younge, 295.

Undivided share.

Nor will an undivided share be forced on a purchaser instead of the entirety: *Att.-Gen.* v. *Day*, 1 Ves. sen. 218, 224; *Dalby* v. *Pullen*, 3 Sim. 29; affirmed 1 Russ. & M. 296; *Re Arnold*, 14 Ch. D. 270; nor a smaller share than he contracted to buy: *Roffey* v. *Shallcross*, 4 Mad. 227. See, however, *English* v. *Murray*, 32 W. R. 84.

Term of years

If a term is much shorter than the number of years stated

(*e.g.* if it is only six instead of sixteen) the contract cannot be enforced (*Long* v. *Fletcher*, 2 Eq. Ca. Abr. 5); or if it is liable to premature determination (*Weston* v. *Savage*, 10 Ch. D. 736); or is voidable at the will of a third party (*Brewer* v. *Broadwood*, 22 Ch. D. 105). See also *Forrer* v. *Nash*, 35 Beav. 167, *ante*, p. 365.

Ch. XXV. s. 6. shorter than stated.

It may be considered as now settled, that a contract to sell a lease is not satisfied by the assignment of an underlease: *Madeley* v. *Booth*, 2 De G. & S. 718; *Darlington* v. *Hamilton*, Kay, 550; *Hayford* v. *Criddle*, 22 Beav. 477; but if the purchaser knew that a short time before the sale the vendor had only an underlease (*Henderson* v. *Hudson*, 15 W. R. 860; *Flood* v. *Pritchard*, 40 L. T. 873); or if the particulars and conditions of sale contain enough to give the purchaser notice that the vendor was an underlessee, he cannot resist specific performance or obtain compensation: *Camberwell Building Society* v. *Holloway*, 13 Ch. D. 754. Disapproved: Re Beyfus & Masters, 39 Ch D. 110.

Lease and underlease.

In the case last cited Sir G. Jessel, M. R., expressed the strongest disapproval of the decision in *Madeley* v. *Booth*, where, it must be observed, there was a condition in the usual form providing that compensation should be made for errors of description.

Where *part* only of the property comprised in a lease is sublet for a term, this subdemise is sometimes called a "derivative" lease to distinguish it from an "underlease," which properly comprises all the premises in the original lease.

Derivative lease.

It is quite clear, that if property described as held under a lease or an underlease is found to be held under a derivative lease, the purchaser cannot be forced to complete. For, in such a case, he would be liable to the payment of the rent, and the observance of the covenants in the superior lease: *Fildes* v. *Hooker*, 3 Mad. 193; *Warren* v. *Richardson*, Younge, 1; *Brumfit* v. *Morton*, 3 Jur. N. S. 1198; *Sheard* v. *Venables*, 36 L. J. Ch. 922; *Turner* v. *Turner*, W. N. 1881, 70. And in a case at common law, it being discovered that the house which had been sold was comprised with another in an original lease, under which the lessor had a right to re-enter for breach of covenants in respect of either house, it was held that the purchaser was not bound to accept the title with an indemnity, but might

Ch. XXV. s. 6.

recover his deposit, and the expenses which he had been put to in the investigation of the title: *Blake* v. *Phinn*, 3 C. B. 976.

Rights or easements undisclosed.

There may be rights or easements possessed by third persons which materially affect the enjoyment of the property, and form a valid objection to the title. Thus, a reservation of the mines with working rights is sufficient to avoid the contract (*Seaman* v. *Vawdrey*, 16 Ves. 390; *Pretty* v. *Solly*, 26 Beav. 606; *Upperton* v. *Nickolson*, L. R. 6 Ch. 436), unless the Court is satisfied that there is no subject-matter for the reservation to act upon, or that the legal right has become extinct: *Lyddall* v. *Weston*, 2 Atk. 19; *Martin* v. *Cotter*, 3 J. & Lat. 496; or that the contract was made with special reference to the provisions of the Copyhold Acts which reserve the minerals to the lord: *Kerr* v. *Pawson*, 25 Beav. 394.

Right of common.

The purchaser may rescind the contract where a meadow is subject to a right of common every third year: *Gibson* v. *Spurrier*, Peake, Ad. Cas. 49; or where part of the estate is subject to a right of sporting not mentioned in the particulars: *Burnell* v. *Brown*, 1 Jac. & W. 168; or is subject to easements which are not apparent on inspection, and which would interfere with the enjoyment of the property: *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; and see *Heywood* v. *Mallalieu*, 25 Ch. D. 357; or where the land sold was, at the date of the contract, and still remained, liable to be taken compulsorily under a private Act of Parliament: *Ballard* v. *Way*, 1 M. & W. 520.

Sporting.

Non-apparent easements.

Liable to compulsory purchase.

Restrictive covenants.

Where property is sold as "freehold," it means an unencumbered freehold, and the existence of restrictive covenants is a defect in title, for which the purchaser may rescind the contract, and recover his deposit: *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159. But if he is aware of the restrictions at the date of the contract, and knows that they cannot be got rid of, he cannot object: *Ellis* v. *Rogers*, 50 L. T. 660. The knowledge of the purchaser, however, is immaterial where there is an express contract to deduce a good marketable title; and in that case, it is also immaterial whether he knew that the covenants could or could not be released: *Cato* v. *Thompson*, 9 Q. B. D. 616; *Re Higgins and Hitchman's Contract*, 21 Ch. D. 95; *Re Gloag and Miller's Contract*, 23 Ch. D. 320.

Sect. 7.—*Purchaser's Action.—Specific Performance with Compensation.*

Vendor and purchaser in different positions.

The difference is as wide as can be between the positions of a vendor and of a purchaser in their respective claims for specific performance with compensation, the general rule being that the latter can, but the former cannot, insist upon this modification of the bargain.

Purchaser may always take what vendor can give.

Thus, it was laid down by Sir W. Grant, that where a misstatement is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation: *Hill* v. *Buckley*, 17 Ves. 394, 401.

Lord Eldon's statement of the doctrine.

This principle is not confined to errors of quantity, for Lord Eldon says:—"I also agree, if a man, having partial interests in an estate, chooses to enter into a contract representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and, therefore, the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction the person, contracting under those circumstances, is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole:" *Mortlock* v. *Buller*, 10 Ves. 292, at p. 315. See also *Lord Bolingbroke's Case*, 1 Sch. & L. 19 (a); *Paton* v. *Rogers*, 1 Ves. & B. 351; *Wood* v. *Griffith*, Wils. Ch. Cas. 34, 44; *Graham* v. *Oliver*, 3 Beav. 124; *Great Western Ry. Co.* v. *Birmingham Ry. Co.*, 2 Ph. 597, 605; *Barrett* v. *Ring*, 2 Sm. & G. 43; *Hughes* v. *Jones*, 3 De G. F. & J. 307, 315.

Difficulty in estimating compensation.

If the difference between the interest which the vendor offers for sale, and that which he actually has, is not susceptible of valuation, it seems to be almost a truism that specific performance with compensation cannot be decreed. "Though the vendor," says Lord Langdale, "cannot be heard to suggest the difficulties which he has occasioned, the Court cannot avoid

Ch. XXV. s. 7.

them:" *Thomas* v. *Dering*, 1 Keen, 729, 746. But, referring to this case, Sir W. M. James, V.-C., said, "In *Thomas* v. *Dering*, it seems to have been thought that the difficulty of making a valuation would be an insuperable objection to the enforcement of the rule, that where a vendor has only a limited interest in the estate contracted to be sold, and cannot perform the whole contract, the purchaser is entitled to have the contract performed to the extent of the vendor's interest, with compensation for the deficiency. In *Nelthorpe* v. *Holgate* (1 Coll. 203), however (in which *Thomas* v. *Dering* was cited), relief was given under circumstances which appear to be exactly the same as here, except in this one respect, that there the person making the contract had the remainder subject to a life interest, and here a life interest only, which makes no difference in the case. The husband here represented himself to be owner of the fee, being, in fact, only entitled to the limited interest I have mentioned. The purchaser entered into his contract with the husband in total ignorance of the state of the title, and without any knowledge that the husband could only sell with the concurrence of his wife. The husband, therefore, is bound to convey all the interest that he has, according to the principle of the authorities that have been cited, and the Court must endeavour to find out, in the best way it can, what compensation is to be made in respect of the interest which he is unable to convey:" *Barnes* v. *Wood*, L. R. 8 Eq. 424, 429.

Purchaser must succeed when compensation can be assessed.

Many of the cases, in which the purchaser was held entitled to hold the vendor to his bargain with an abatement from the purchase-money, have been already referred to in sect. 3, on the "*Assessment of Compensation.*" It is, therefore, unnecessary again to refer to the decisions in detail; they are, in fact, all covered by the two principles, which are generally applicable, viz.:—(1) that the purchaser may, if he pleases, insist on compensation, if the compensation can be estimated; (2) that the Court will, in a purchaser's action, endeavour to overcome any difficulty which may arise in the assessment of compensation.

Lessor and lessee.

The same principles, which govern the contract of sale, seem to apply to agreements for leases.

If, for example, a limited owner contracts to grant a lease for

a longer term than his estate or power authorizes, the lessee may take such a term as the lessor can grant with compensation for the deficiency: *Leslie* v. *Crommelin*, Ir. R. 2 Eq. 134. See also *Dyas* v. *Cruise*, 2 J. & Lat. 460.

Effect of condition.

A condition which provides that compensation shall be made for errors of description expresses the general law. On the other hand, a condition precluding the purchaser from compensation under such circumstances, receives a limited construction so as to cover only "small unintentional errors and inaccuracies:" *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603. Qy. See Jenn v Wimbs Contract 32 Ch D. 14.

SECT. 8.—*Purchaser's Action.—Compensation refused.*

General rule.

The general rule being, that a purchaser is entitled to take what the vendor can give, with an abatement of his purchase-money for the deficiency; the cases must now be considered which form the exceptions to that rule.

Classification.

The purchaser's right to compensation will be excluded—

1. By express contract.
2. Where the compensation cannot be ascertained.
3. On the ground of extreme hardship to the vendor.
4. By knowledge or notice of the defect.
5. Where enforcing the contract would prejudice the rights of third persons.

Rule of construction.

Although conditions excluding compensation are construed in the strictest manner, where the vendor seeks specific performance, it is otherwise where the purchaser is plaintiff and claims an abatement. If the conditions are so framed, that the vendor has power to rescind the contract, it is clear that the purchaser who claims specific performance with compensation can no longer rely upon the general doctrine of the Court, that the purchaser may take what the vendor can give, but must found his claim upon the terms of some clause in the agreement. For, otherwise, the vendor can cut the ground from under his

Ch. XXV. s. 8.

feet by rescinding the contract. See the judgment of Lord Westbury in *Cordingley* v. *Cheeseborough*, 4 De G. F. & J. 379, which rests entirely upon this distinction.

Rescission.

In order to avoid the payment of compensation by rescinding the contract, the vendor must of course justify rescission according to the letter of the conditions. Thus, if the clause relating to rescission is limited to objections to *title*, the vendor cannot rescind because the purchaser claims compensation for a mere misdescription: *Painter* v. *Newby*, 11 Hare, 26; *Hoy* v. *Smythies*, 22 Beav. 510. *Secus*, if the claim for compensation is founded upon a defect of title: *Mawson* v. *Fletcher*, L. R. 6 Ch. 91. Or if the condition is expressed in general terms: *Heppenstall* v. *Hose*, 33 W. R. 30.

The right to rescind may be lost by delay: *Bowman* v. *Hyland*, 8 Ch. D. 588.

Agreement void in event which happens.

Similarly, if there is a clause in the agreement which provides that it shall be void in an event which happens,—*e. g.* if the opinion of the purchaser's counsel as to the title should be unfavourable—the purchaser's action for specific performance with compensation will be dismissed with costs: *Williams* v. *Edwards*, 2 Sim. 78.

Dispute as to title.

Where an agreement contained a provision, that if any dispute should arise as to the title, the same should be submitted to a conveyancer, and in case he should be of opinion that a good title could not be made out, then that either of the parties should be at liberty to rescind the contract; it was held that the vendor could not claim the benefit of this clause, where the defect of title was beyond all dispute, and was known to him at the date of the contract: *Nelthorpe* v. *Holgate*, 1 Coll. 203.

Defect not capable of being valued.

A defect which is incapable of being accurately assessed cannot form the subject of a money compensation, as to which see Sect. 3, *Assessment of Compensation*.

Thus, where it was stated that the fines in a manor were arbitrary, which was only true as to fines on alienation, and the average income derived from the manor was correctly furnished,

Principle stated by Lord Brougham.

Lord Brougham said, "Nor do I very well see how the master could by any kind of inquiry satisfy himself as to the amount of compensation; that is to be measured merely by the difference

between arbitrary and fixed fines:" *White* v. *Cuddon*, 8 Cl. & F. 766, at p. 786. In the same case Lord Cottenham observed: "But it is an inquiry which I apprehend it is utterly impossible for the master to make; and that also has been in more cases than one considered as a fatal objection to a decree for compensation, when you cannot ascertain what the compensation should be:" p. 792.

Lord Cottenham.

The difficulty has also been referred to by Lord Romilly, M. R., in the following terms:—"In all these cases, where the Court has found that it is utterly impossible to deal with the case as one for compensation, it has said, 'this is not a case for compensation, but one for avoiding the contract.' For instance, if a man sells freehold land, and it turns out to be copyhold, that is not a case for compensation; so if it turns out to be long leasehold, that is not a case for compensation; so if one sells property to another, who is particularly anxious to have the right of sporting over it, and it turns out that he cannot have the right of sporting, because it belongs to somebody else, I apprehend it is not a case in which the Court can ascertain what should be the amount of compensation to be given. In all those cases the Court simply says it will avoid the contract, and it will not allow either party to enforce it, unless the person who is prejudiced by the error be willing to perform the contract without compensation:" *Earl of Durham* v. *Legard*, 34 Beav. 611, 613. See also Sect. 3, *Assessment of Compensation*.

Lord Romilly.

In all cases when an abatement from the purchase-money is allowed, it operates somewhat harshly on the vendor, who is thereby punished for having made a mistake. But when the deduction to be made is so large that the vendor would derive little or no benefit from the modified contract, the Court illogically, but mercifully, declines to enforce specific performance.

Hardship.

Thus, when the vendors were entitled only to nine-sixteenths instead of the entirety of the property, and there was a charge on the property which greatly exceeded the amount of the purchase-money after a proportional abatement, specific performance was refused: *Wheatley* v. *Slade*, 4 Sim. 126.

On the same ground trustees for sale, who inadvertently contracted a personal obligation to exonerate the estate from in-

Trustees for sale.

Ch. XXV. s. 8.

cumbrances, were not held to their bargain when it turned out that the amount of the incumbrances exceeded the purchase-money: *Wedgwood* v. *Adams*, 6 Beav. 600; 8 Beav. 103. See also *Bainbridge* v. *Kinnaird*, 32 Beav. 346; *Earl of Durham* v. *Legard*, 34 Beav. 611; *Re Great Northern Rail. Co. and Sanderson*, 25 Ch. D. 788.

Reciprocal rights of vendor and purchaser.

It has been already stated that the vendor can enforce specific performance, notwithstanding a defect in the property, without making compensation, when the purchaser knew of the defect at the date of the contract, and in some cases even when he had constructive notice of it (see *ante*, p. 363). And *à fortiori* in such cases the purchaser cannot as plaintiff establish his right to compensation.

In one case, indeed, the purchaser's bill claiming compensation was dismissed, when the vendor could not have obtained specific performance without allowing compensation: *James* v. *Lichfield*, L. R. 9 Eq. 51. In this case the purchaser knew that the property was in the occupation of a tenant, and he was held to be affected with constructive notice of the fact that he held under a lease. Having regard, however, to the subsequent case of *Caballero* v. *Henty* (L. R. 9 Ch. 447), this decision of Lord Romilly's must be regarded as of doubtful authority.

Agreement for a lease.

An agreement with a limited owner to take a lease for a longer term than he can legally grant, cannot be partially performed at the suit of the intended lessee, if he knew that the contract was inconsistent with the settlement: *Lawrenson* v. *Butler*, 1 Sch. & L. 13.

The purchaser's bill for specific performance of an agreement for a lease, with compensation for an existing lease was dismissed, on the ground that he knew of its existence, and that the real contract was to grant a lease when the surrender of the other lease was obtained: *Beeston* v. *Stutely*, 27 L. J. Ch. 156.

Sale of wife's estate.

So where a husband and wife contracted to sell the fee simple of the wife, and the wife afterwards refused to convey, the purchaser was held not entitled to a conveyance of the husband's interest with an abatement from the purchase-money: *Castle* v. *Wilkinson*, L. R. 5 Ch. 534.

Breach of trust.

It is generally true that specific performance will not be

enforced when the sale takes place under circumstances which amount to a breach of trust: *Ord* v. *Noel*, 5 Mad. 438; *Wood* v. *Richardson*, 4 Beav. 174; *Maw* v. *Topham*, 19 Beav. 576; Lewin, 389, 7th ed. And, in accordance with this principle, it seems that specific performance, with an abatement from the purchase-money, by way of compensation for misdescription, cannot be enforced against trustees for sale; at all events, when the claim for compensation arises out of the negligence of the trustees: *White* v. *Cuddon*, 8 Cl. & F. 766. See also *Neale* v. *Mackenzie*, 1 Keen, 474.

Fraud on power.

A contract by a tenant for life to grant a lease under a power will not be enforced *pro tanto*, if it amounts to a fraud upon the power: *Lawrenson* v. *Butler*, 1 Sch. & L. 13; *Harnett* v. *Yeilding*, 2 Sch. & L. 549; even if the purchaser waives his claim to compensation: *O'Rourke* v. *Percival*, 2 Ball & B. 58. In all these cases the lessee was a party to the fraud. In the absence of fraud there seems no doubt that the Court will decree a partial performance, and order the tenant for life to grant a lease for as long a term as his estate enables him to do: *Dyas* v. *Cruise*, 2 J. & Lat. 460. See also Sugden, Powers, 556.

Settled estates.

Where the vendor was tenant for life *without impeachment of waste* under a settlement, the Court declined to decree a partial performance, among other reasons, because it would be prejudicial to persons interested in the property, but not parties to the contract: *Thomas* v. *Dering*, 1 Keen, 729.

CHAPTER XXVI.

MISREPRESENTATION AND FRAUD.

SECT.		PAGE
1.	*Misrepresentation as distinguished from misdescription*	382
2.	*By whom misrepresentation may be made*	384
	i. *Vendor*	384
	ii. *Purchaser*	385
	iii. *Agent*	385
	iv. *Third person*	389
3.	*How and when misrepresentation may be made*	393
4.	*What the misrepresentation may consist of*	396
	i. *Existing facts*	396
	ii. *Indefinite statements*	398
4.	*What the misrepresentation, &c.*—continued.	
	iii. *Simple commendation*	399
	iv. *Disparaging statements*	399
	v. *Statements of value*	399
5.	*The falsehood of the statement*	401
6.	*Legal and moral fraud*	402
7.	*Reliance on the statement by the person to whom it is made*	405
8.	*Suppressio veri*	408
9.	*The remedies of the person deceived*	413
10.	*Laches and delay*	414

SECT. 1.—*Misrepresentation as distinguished from Misdescription.*

Misrepresentation and misdescription.

A MISREPRESENTATION, as distinguished from misdescription, is a false, although not necessarily fraudulent, statement, made in the course of the treaty, which conduces to but is entirely collateral to the contract itself. The essential difference is, that the description is part of the contract, the representation is *dehors* the contract. If there is an error in the former, it constitutes a breach of contract, and confers a consequential right to damages, or, it may be, a right to rescind. If, on the other hand, the representation is false, the party deceived thereby may say that the statement caused him to enter into the contract; that if he had known the truth he would not have done so; and therefore that the contract should be rescinded *in toto*. Moreover, where misrepresentation confers a right of action, it is in the nature of tort not contract.

The following extract from the judgment of the Court of Exchequer Chamber, in *Behn* v. *Burness* (3 B. & S. 751, 753), marks this distinction in the clearest manner:—

Behn v. *Burness.*

"A representation is a statement, or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract, and, consequently, the contract is not broken though the representation proves to be untrue; nor is such untruth any cause of action unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly with a reckless ignorance whether it was true or untrue.

"Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court and not the jury must determine. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as by authority, appears to be, generally speaking, that if such descriptive statement *was intended to be a substantive part of the contract*, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour."

Misdescription and mis-

Misdescription, it may be observed, is always the error of the

Chap. XXVI. s. 1.

vendor; misrepresentation may be made by either party. Moreover, misdescription is *ex vi termini* confined to the misstatement of some particular relating to the subject-matter of the contract; whereas misrepresentation is not so limited.

Misrepresentation further distinguished.

Distinction not always observed.

The distinction which has been drawn between misrepresentation and misdescription is not always, so far at least as the use of the words is concerned, carefully observed, and the reader is therefore warned against the confusion introduced by such expressions as "The vendor *misrepresented* the acreage in the particulars."

When it is found that in such a case the vendor can enforce specific performance, paying compensation for the slight deficiency, it is naturally somewhat embarrassing to find the conflicting statement that misrepresentation is always a bar to specific performance. The explanation is simply that the word is used in two different senses.

Fraudulent and innocent misrepresentations.

Misrepresentation is not necessarily fraudulent; but fraud is so often present that the two subjects cannot be conveniently separated. There is, however, an important difference between a fraudulent and an innocent misrepresentation in respect of the rights possessed by the person deceived. Both are alike defences to an action for specific performance; both entitle the person to whom the false statement is made to rescind the contract, while it remains *in fieri;* but it is only fraud or wilful misrepresentation which can form the subject of an action for damages in the nature of an action of deceit, or (as a general rule) justify the rescission of an executed contract. See *Nash* v. *Wooderson*, 33 W. R. 301.

Sect. 2.—*By whom Misrepresentation may be made.*

Misrepresentation by the vendor.

In the large majority of cases it is the vendor who is charged with misrepresentation. He, as a rule, is acquainted with the property, and upon him devolves the duty of describing it. Occasionally he goes beyond the fair limits of commendation,

and in his eagerness to secure an advantageous bargain commits himself to a statement which cannot be supported by the facts and circumstances of the property. Numerous examples of misrepresentation by the vendor occur in the subsequent pages of this chapter, and it is therefore unnecessary here to dwell on the subject in detail.

Commendation.

A vendor is not held liable for puffing statements which fall within the limits of fair commendation. See *post*, p. 399.

By the purchaser.

The cases are rare in which a purchaser of land has the opportunity of making a misrepresentation; but where the purchaser had, and the vendor had not full knowledge of the property, a deliberate misstatement of its value by the purchaser, in reliance on which the vendor conveyed the estate at a gross undervalue, was held to be fraudulent, and to justify rescission: *Haygarth* v. *Wearing*, L. R. 12 Eq. 320.

A sale by the Court may be set aside, even after the lapse of ten years, when the information supplied by the purchaser to the judge, for the purpose of enabling him to determine whether the sale should be sanctioned, is incomplete and misleading: *Boswell* v. *Coaks*, 27 Ch. D. 424.

As to value by an agent.

So, very slight misrepresentation of value by a land agent, who is purchasing from his employer, disqualifies him from calling for the aid of a Court of equity to enforce the contract: *Cadman* v. *Horner*, 18 Ves. 10.

As to seller's chance of sale.

No action, however, lies against a purchaser for misrepresenting the seller's chance of sale, or the probability of his getting a better price than that offered by the purchaser: *Vernon* v. *Keys*, 12 East, 632, 638.

Disparaging statements.

Disparaging statements as to the property by the purchaser stand on the same footing as puffing descriptions by the vendor, and are disregarded by the Court. See *Tate* v. *Williamson*, L. R. 1 Eq. 528; *ibid.* 2 Ch. 55, 65.

Misrepresentation by agent.

An agent employed to let or sell a house has implied authority to describe the property truly, to represent its actual situation, and, if he thinks fit, to represent its value. He is authorized by his principal to tell the truth, but not to state any falsehood. If, however, he does state any falsehood on behalf of his prin-

cipal, and thereby induces a purchaser to enter into a contract, the principal cannot enforce the contract: *Mullens* v. *Miller*, 22 Ch. D. 194; *Smith* v. *Land Corporation*, 28 Ch. D. 7; even if the agent had no authority to make any representation on the subject. See per Lord Abinger, C. B., *Cornfoot* v. *Fowke*, 6 M. & W. 358, 386.

Bonâ fide statement by auctioneer.

But no action will lie after completion to recover compensation from the vendor for a false statement made *bonâ fide* by an auctioneer at the sale, although the purchaser may have been thereby induced to give a larger price for the property than he would otherwise have given. And it seems that the principle, that a man has no right to retain the benefit of a contract obtained by the misrepresentation of himself or his agent has no application when the misrepresentation is innocent: *Brett* v. *Clowser*, 5 C. P. D. 376, 386; see *Hume* v. *Pocock*, L. R. 1 Ch. 379.

Auctioneer's authority.

It seems to have been considered in *Brett* v. *Clowser* that the auctioneer had no authority to make a statement as to an existing right of way. See also *Trower* v. *Newcome*, 3 Mer. 704.

Fraud of agent.

The fraudulent statement of an agent will justify the rescission of the contract; for "the fraud of the agent who makes the contract is the fraud of the principal:" *Wheelton* v. *Hardisty*, 8 E. & B. 232, 260.

Contract to take shares.

This proposition is illustrated by numerous cases in Company Law which establish the rule, that "where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract." Per Lord Chelmsford, L. C., *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145, 157. See also *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Tennent* v. *City of Glasgow Bank*, 4 App. Cas. 615; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.

Action of deceit against principal.

The questions of greatest difficulty are those in which it is sought to make the principal liable in damages for the fraud of his agent.

Cornfoot v. *Fowke*.

In the case of *Cornfoot* v. *Fowke*, 6 M. & W. 358, which involved substantially the same issue as an action of deceit, the facts were as follows:—The owner of a house employed an agent to let it. The defendant, in the course of negotiation, asked the agent whether there was anything objectionable about the house, and was assured that there was not. On the faith of that representation the defendant entered into the contract, and after having done so, discovered that an intolerable nuisance, which was known to the principal but not to the agent, existed in the immediate neighbourhood. On discovering this fact, the defendant refused to complete the contract. The owner brought an action against him for not performing the agreement, and a plea was put in that the defendant was induced to enter into the contract by the fraud of the plaintiff. It was held by the majority of the Court, Lord Abinger, C. B., dissenting, that the charge of fraud could not be sustained, because the principal, though he knew the fact, was not cognizant of the misrepresentation, nor even directed the agent to make it; and the agent, though he made a misrepresentation, made it without knowing it to be false.

This case explained.

This case, "though often commented on and misunderstood, was rightly decided"—per Lord Cranworth, L. C., in *Bartlett* v. *Salmon*, 6 De G. M. & G. 33, 39; and the explanation given by the Lord Chancellor—viz., that it turned on the plea of fraud—was accepted by Lord St. Leonards as satisfactory: *National Exchange Co.* v. *Drew*, 2 Macq. 103, 145. See also per Willes, J., in *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, 262; *Ludgater* v. *Love*, 44 L. T. 694.

It seems, therefore, that *Cornfoot* v. *Fowke* only decides that an action of deceit cannot be maintained against a principal for the innocent misrepresentation of his agent. But *quære*, whether the positive assertion of the agent was innocent. See *Haycraft* v. *Creasy*, 2 East, 92.

Intentional employment of ignorant agent.

This case must not be taken as any authority on the subject of the validity of such a contract. If a man, knowing that there is a serious nuisance affecting his house, employs an agent who is ignorant of the fact, and if in the course of the treaty the agent denies the existence of any nuisance, the misrepre-

Chap. XXVI. s. 2.

sentation would vitiate the contract—per Lord St. Leonards, *National Exchange Co.* v. *Drew*, 2 Macq. 103, 145; approved in *Ludgater* v. *Love*, 44 L. T. 694. And if a principal knowingly refers to an ignorant agent it amounts to fraud. See *Wilson* v. *Fuller*, 3 Q. B. 68, 75. In *Cornfoot* v. *Fowke*, the knowledge of the principal was not imputed to the agent, so as to make his representation actually fraudulent; but different considerations arise when the statement of the agent is false and fraudulent. The principal is then liable if he authorized the fraud, or if he has taken the benefit of it.

When principal liable for fraud of agent.

Inasmuch as the gist of the action of deceit is actual fraud (see *Joliffe* v. *Baker*, 11 Q. B. D. 255), there is some difficulty in maintaining that such an action can be brought against a principal for the fraudulent representation of his agent. Whatever the action be called, however, there is no doubt that the plaintiff can recover in the following cases:—

i. Agent acting within the scope of his authority.

(1.) The principal is answerable when the agent is acting within the scope of his authority, although the principal has not authorized the particular fraudulent act. "He has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself." Per Willes, J., *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, 266. See *National Exchange Co.* v. *Drew*, 2 Macq. 103; *New Brunswick Ry. Co.* v. *Conybeare*, 9 H. L. C. 711; per Jessel, M. R., in *Eaglesfield* v. *Londonderry*, 4 Ch. D. 693, at p. 708; *Swire* v. *Francis*, 3 App. Cas. 106.

This is a principle not of the law of torts, or of fraud or deceit, but of the law of agency. Per Lord Selborne, *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317, 326.

ii. Principal deriving benefit cannot repudiate agency.

(2.) When the principal takes advantage of the fraud of his agent, he cannot afterwards repudiate the agency. Per Lord Coleridge, C. J., *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301, 312. This proposition has also been stated with the qualifications—(a) that the agent must be acting within the scope of his authority (*Mackay* v.

Commercial Bank of New Brunswick, L. R. 5 P. C. 394); and (b) that the liability of the principal is limited to the extent to which he has profited by the fraud: *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145, 167. But it is conceived that the true principle is that stated by Lord Coleridge, and that the measure of damages is the loss to the plaintiff, and not the profit made by the defendant. See *Mullett* v. *Mason*, L. R. 1 C. P. 559; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317, 329.

Implied contract for honesty of agent.

The true ground, according to Lord Bramwell, on which the person damnified by the fraud of an agent can recover from the principal is, "that every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract:" *Weir* v. *Bell*, 3 Ex. D. 238, 245.

Liability of agent.

If an agent in the course of his employment commits a fraud upon another party, whereby damage ensues to the latter, he will be liable to the party wronged, though his principal would be so likewise. Per Cockburn, C. J., *Weir* v. *Bell*, 3 Ex. D. 238, 248.

Of solicitor.

So, if the solicitor of the vendor of an estate, knowing of incumbrances thereon, treats for his client in the sale thereof without disclosing them to the purchaser, but represents it so as to induce him to trust his money upon it, a remedy lies against the solicitor personally: *Arnot* v. *Biscoe*, 1 Ves. sen. 95.

False statement by third person.

A false representation made by a third person to one of the contracting parties, without the knowledge of the other, does not affect the contract: *Duranty's Case*, 26 Beav. 268; *Ex parte Worth*, 4 Drew. 529.

Such a representation, therefore, although it may give a right of action against the person who makes it (see Ch. XXIX.), is not a defence to an action for specific performance, and *à fortiori* does not entitle the person deceived to rescind the contract. See *Pulsford* v. *Richards*, 17 Beav. 87.

Doctrine stated by Lord Eldon.

"It is a very old head of equity," said Lord Eldon, "that if a representation is made to another person, going to deal in a

Chap. XXVI. s. 2.

matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false:" *Evans* v. *Bicknell*, 6 Ves. 174, 182.

Subsequently extended.

So stated, the doctrine of equitable estoppel does not seem to go beyond the right of action for deceit; but in subsequent cases it has been held that knowledge of the falsehood, which is of the essence of an action for deceit, is not a necessary ingredient in the doctrine now under consideration.

Trustee with notice of incumbrance.

A trustee has been held liable to make good his representation that a trust fund was not incumbered, when he had ten years before received notice of a partial assignment; although the fact of such notice had escaped his memory.

"It is no excuse to say, he did not recollect it. At least, it was gross negligence to take upon him to aver positively and distinctly that the fund was unincumbered, without giving himself the trouble to recollect whether the fact was so or not:" *Burrowes* v. *Lock*, 10 Ves. 470.

Lessor granting a second lease.

In a later case a lessor, forgetting that he had already granted a lease of the premises to a builder, represented to an intending mortgagee of the builder that he was prepared to grant to him a lease of the same premises at a peppercorn rent; and subsequently purported to do so. The mortgagee advanced his money on the security of this lease, which proved worthless. It was held that the lessor must make good the loss: *Slim* v. *Croucher*, 1 De G. F. & J. 518. See also *Rashdall* v. *Ford*, L. R. 2 Eq. 750.

These cases support the proposition that a person making an untrue representation to another, about to deal in a matter of interest upon the faith of that representation, will be compelled to make good his representation, whether he knew it to be false or made it through forgetfulness of the fact. See *Peek* v. *Gurney*, L. R. 6 H. L. 377, 390.

Injunction.

An injunction may be granted restraining a man from exercising his legal rights in a manner inconsistent with the representations made to another.

Thus, on the treaty for a lease, the lessor represented to the lessee that the space in front of the demised premises, lying between them and the sea (of which he was also lessee), could

not be built upon, because it was forbidden by a covenant in his lease. The lessee inspected the original lease, and being satisfied with the restrictions imposed, took an underlease, and erected houses on the land. The lessor subsequently surrendered his lease, and took a new one not containing restrictive covenants, and commenced building so as to shut out the sea view from the plaintiff's houses. He was, however, restrained from doing so, the obvious meaning of his representation being that no buildings could be erected during the term for which his lease was granted: *Piggott* v. *Stratton*, 1 De G. F. & J. 33.

The decision has, however, been referred to the head of contract, rather than of representation, by the Earl of Selborne, L. C., in *Maddison* v. *Alderson*, 8 App. Cas. 467, at p. 473.

Standing by.

Under this head of equity must be classed those cases referred to by Lord Hardwicke in *East India Co.* v. *Vincent* (2 Atk. 83): "where a man has suffered another to go on with building upon his ground, and not set up a right till afterwards, when he was all the time conusant of his right. In these cases the Court would oblige the owner of the ground to permit the person building to enjoy it quietly, and without disturbance."

Ramsden v. *Dyson*.

The principles on which these cases rest are as old as equity, but they have been recently enunciated in the House of Lords, as follows: "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money, on the supposition that the land was his own. But if a stranger builds on my land, knowing it to be mine, there is no principle of equity which would prevent my claiming the land, with the benefit of all the expenditure made on it. It follows as a corollary from these rules that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined." Per Lord Cranworth, *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, 140. See *Clavering's Case*, cited 5 Ves.

690; *Dann* v. *Spurrier*, 7 Ves. 231; *Gregory* v. *Mighell*, 18 Ves. 328; *Powell* v. *Thomas*, 6 Hare, 300; *Bankart* v. *Tennant*, L. R. 10 Eq. 141; *Weller* v. *Stone*, 33 W. R. 421.

Tenants in common.

The principle is the same whether the owner and the person expending the money by mistake are strangers, or tenants in common of the property: *Clare Hall* v. *Harding*, 6 Hare, 273.

A man is not to be deprived of his legal rights unless there be fraud, or such acquiescence as in the view of the Court would make it a fraud afterwards to insist upon the legal right: *Gerrard* v. *O'Reilly*, 3 Drew. & War. 414. And see *Willmott* v. *Barber*,

Necessary elements.

15 Ch. D. 96; where the elements necessary to constitute fraud of that description are stated by Lord Justice (then Mr. Justice) Fry to be the five following:—(1) the stranger must have made a mistake as to his legal rights; (2) he must have expended his money on the faith of his mistaken belief; (3) the owner must be aware of his own right; (4) the owner must also be aware of the stranger's mistake; and (5) he must have encouraged the stranger in the expenditure of his money, either actively, or by not asserting his legal right.

Real owner standing by while property is sold.

A person who, knowing his own title to land, permits another to purchase the property without notice of his claim, will not afterwards be allowed to set up his title against the purchaser. "For it was an apparent fraud in him not to give notice of his title to the intended purchaser; and in such case infancy or coverture shall be no excuse. Nor is it necessary that such infant or *feme covert* should be active in promoting the purchase, if it appears that they were so privy to it that it could not be done without their knowledge:" *Savage* v. *Foster*, 9 Mod. 35. See also *Hobbs* v. *Norton*, 1 Vern. 136; *Thompson* v. *Simpson*, 2 J. & Lat. 110.

Incumbrancer not bound to give notice to purchaser.

A person having an incumbrance on an estate is not bound to give notice of it to a person whom he knows to be in treaty for the purchase of the estate: *Osborn* v. *Lea*, 9 Mod. 96.

Priority, in the case of incumbrances upon real estate, does not depend on notice to the trustees. A mortgagee is therefore not bound to give such notice; and, in the absence of fraud, his motive for abstaining is immaterial: *Rooper* v. *Harrison*, 2 K. & J. 86.

But if the mortgagee in any way encourages the lender to advance his money or conceals his own security, he will be postponed: *Draper* v. *Borlace*, 2 Vern. 370; *Ibbottson* v. *Rhodes*, *ibid.* 554; *Boyd* v. *Belton*, 1 J. & Lat. 730. Thus, where a mortgagee was present at the treaty for a marriage settlement, and fraudulently concealed his mortgage, privately assuring the father of the intended husband that he would trust to his personal security, it was deemed that the interests created by the settlement should rank in priority to the mortgage: *Berrisford* v. *Milward*, 2 Atk. 49. So, where the widow of a testator was entitled to charges on the property, and was also a trustee and executrix under his will, she was held to have lost priority for her charges, by joining in a mortgage by the beneficiary; and, "as such surviving devisee in trust and executrix as aforesaid" conveying the legal estate: *Stronge* v. *Hawkes*, 4 De G. M. & G. 186.

Mortgagee postponed if he encourages subsequent advance.

SECT. 3.—*How and when Misrepresentation may be made.*

A misrepresentation may be made either verbally or in writing, and may be proved by parol evidence, although the fraudulent or deceitful representation was not noticed in the written agreement, or in the conveyance which was afterwards executed by the parties: *Dobell* v. *Stevens*, 3 B. & Cr. 623; and see *Brett* v. *Clowser*, 5 C. P. D. 376, 385.

Parol evidence.

"Where a misrepresentation of a material fact not within the observation of the opposite party is made, the person making the misrepresentation knowing at the time that his statements are untrue, under such circumstances an action may be maintained for the purpose of recovering a compensation in damages notwithstanding the contract was in writing, and notwithstanding those particulars may be no part of the terms of the written contract. If that be so, it would follow also, that in a Court of equity, a party would be entitled to come forward for the purpose of obtaining redress in order to get rid of a contract founded

Action of deceit.

Rescission.

Chap. XXVI. s. 3.

on such fraudulent misrepresentations." Per Lord Lyndhurst, C. B., *Small* v. *Attwood*, You. 407, 461.

This does not conflict with the rule that parol evidence is not admissible to vary a written agreement; for it has been always held that collateral circumstances may be proved by parol. "If duress be pleaded, or a false reading of the deed, you avoid the deed at law by parol evidence; but then these facts are collateral to the import of the instrument; they are *dehors* the agreement; they do not go to vary or alter it; yet, admitting the truth of the agreement, they tend to show that it ought not to affect the party:" *Davis* v. *Symonds*, 1 Cox, 402.

Fraudulent acts.

Acts may be fraudulent as well as words, and may suffice to avoid the contract. Thus, plastering over the cracks in a wall (see *Pickering* v. *Dowson*, 4 Taunt. 779, 785), the "salting" of a diamond mine, covering a clay pit with a layer of finer clay than its own, are of course gross frauds which entitle the purchaser to rescind the contract.

Concealment

Mere silence is not fraudulent unless there be a duty to speak; as to which see *post*, *Suppressio veri*.

Person to whom the statement is made.

It is not necessary that the statement should be made directly to the person injured; as, for example, where the son of the purchaser of a warranted gun was injured by its bursting; although the representation was made to the father, the son brought an action and recovered damages: *Langridge* v. *Levy*, 2 M. & W. 519. Again, where on the sale of a public-house the vendor falsely represented the receipts to be 180*l.* a month, a sub-purchaser to whom this statement was communicated was held entitled to maintain an action against the original vendor: *Pilmore* v. *Hood*, 5 Bing. N. C. 97. And a statement may, of course, be made to all the world, as by a prospectus: *Peek* v. *Gurney*, L. R. 6 H. L. 377; or an advertisement: *Ferrier* v. *Peacock*, 2 F. & F. 717; *Richardson* v. *Silvester*, L. R. 9 Q. B. 34.

"It is now well established that in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communi-

cated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff as one of the public acts on it, and suffers damage thereby." Per Quain, J., *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244, 253; *ibid.* 9 Q. B. 301.

Time when representation is made.

It is clear that the misrepresentation must be made before or at the time of the contract, and not after it: *Lysney* v. *Selby*, 2 Lord Raym. 1118; and, in order to justify the rescission of the contract, the false statement must have been the cause, but not necessarily the sole cause of the contract. Fraud gives a cause of action if it leads to any sort of damage; it avoids contracts only when it is the ground of the contract, and when, unless it had been employed, the contract would never have been made. See per Lord Wensleydale, *Smith* v. *Kay*, 7 H. L. C. 750, 775.

Limits of responsibility.

The legal limits of responsibility for misrepresentation are thus defined by Sir W. Page Wood, V.-C., in *Barry* v. *Croskey*, 2 J. & H. 1.

"Every man must be held responsible for the consequences of a false representation made by him to another—(1) upon which that other acts, and, so acting, is injured or damnified; or (2) upon which a third person acts, and, so acting, is injured or damnified; provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss. But, to bring it within the principle, the injury must be the immediate, and not the remote, consequence of the representation thus made" (pp. 22, 23).

This statement was approved in the House of Lords by Lord Cairns in *Peek* v. *Gurney*, L. R. 6 H. L. 377, 413.

Dolus dans locum contractui.

Fraud or misrepresentation must, in all cases, it is conceived, be connected with the contract in order that relief may be given; but "there is a very great difference between a matter executory and a matter executed. Thus, for instance, if you have a bill for specific performance, much less misrepresentation and fraud may be necessary to answer that bill and to call upon the Court to refuse to decree specific performance than would be required, after the execution of the contract, to set it aside. After the contract is executed, it would require a great deal

more stringent proof of fraud, *dolus dans locum contractui*, to set the contract itself aside, than would be required to prevent its specific performance if the matter had rested *in fieri*, and had been executory merely." Per Lord Brougham, *Burnes* v. *Pennell*, 2 H. L. C. 497, 529. See also *National Exchange Co.* v. *Drew*, 2 Macq. 103, 123.

Sect. 4.—*What the Misrepresentation may consist of.*

Fact and not law.

It is well settled that a person cannot be made liable for misrepresentation, unless the misstatement relates to an existing fact, and not merely to matter of law: *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777; L. R. 7 H. L. 102; and see *Rashdall* v. *Ford*, L. R. 2 Eq. 750; *Eaglesfield* v. *Londonderry*, 4 Ch. D. 693; 26 W. R. 540; or matter of belief or opinion: *Bellairs* v. *Tucker*, 13 Q. B. D. 562. See, however, *Smith* v. *Land Corporation*, 28 Ch. D. 7. And, at all events, in the absence of wilful misrepresentation, an erroneous statement of law is no ground for rescinding an executed contract: *Legge* v. *Croker*, 1 Ball & B. 506.

Belief or opinion.

But it is conceived that if a man wilfully misrepresented the law, he could not enforce specific performance, or be allowed to retain any benefit obtained by such misrepresentation, see *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360. It would seem that where a person has been induced to execute a deed by misrepresentation as to its legal effect, he has a good defence to an action founded on the deed: *Hirschfield* v. *L. B. & S. C. R. Co.*, 2 Q. B. D. 1.

Construction of document for judge, not jury.

The construction of the document which contains the alleged misrepresentations is for the judge; and if, in his opinion, the statements in such document are not of existing facts, but are mere expressions of opinion, he ought to give judgment for the defendant without leaving any question to the jury: *Bellairs* v. *Tucker*, 13 Q. B. D. 562, 574.

What is misrepresentation of law.

It is not always easy to distinguish between statements of law and fact. A misrepresentation of law has been thus defined by Sir G. Jessel, M. R.: "A misrepresentation of law is this:

when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the fact is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law:" *Eaglesfield* v. *Londonderry*, 4 Ch. D. 693, at p. 702.

The distinction may be illustrated by the following case: The steward of a gentleman, acting without authority, executed in his name an agreement for a lease. It was held that, by executing the instrument in the name of another, he represented himself as in fact an authorized agent for that purpose; and he was accordingly held liable: *Collen* v. *Wright*, 8 E. & B. 647. So, when trustees of a building society gave a receipt for money lent to the society, this was held to be a representation that there was in fact a rule enabling them to receive the money: *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; see also *Cherry* v. *Bank of Australasia*, L. R. 3 P. C. 24.

Tenure.

The tenure of land is matter of fact, not a conclusion of law; and thus if a man sells land as freehold which is in fact copyhold, and knowledge of the truth is brought home to him, so as to establish a case of fraud, the sale will be set aside even after conveyance: *Hart* v. *Swaine*, 7 Ch. D. 42; approved and explained, *Brownlie* v. *Campbell*, 5 App. Cas. 925.

Title.

The title to land involves both facts and law, and so far as it depends on the former it may be the subject of misrepresentation; but, in the absence of fraud, a representation by the agent of the vendor that the latter has a good title is no ground for relieving the purchaser from an agreement entered into on the faith of such representation: *Hume* v. *Pocock*, L. R. 1 Ch. 379.

Intention.

"A representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything, it is a contract or promise." Per Mellish, L. J., *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777, 804.

An action of deceit, therefore, does not lie for a representation that it is intended to do certain things which are not afterwards done: *Vernon* v. *Keys*, 12 East, 632. In *Edgington* v. *Fitzmaurice* (32 W. R. 848; affirmed, 29 S. J. 320), it seems to

have been held that a statement of intention may amount to an actionable misrepresentation, if the person who was deceived can show that there never was any intention of doing what was promised. See also the observations of Lord Campbell in *Piggott* v. *Stratton*, 1 De G. F. & J. 33, 51.

Nor does the doctrine of equitable estoppel apply to promises *de futuro*, which, if binding at all, must be binding as contracts: *Jorden* v. *Money*, 5 H. L. C. 185, 226; *Citizens' Bank of Louisiana* v. *First National Bank*, L. R. 6 H. L. 352; *Maddison* v. *Alderson*, 8 App. Cas. 467; disapproving, *Loffus* v. *Maw*, 3 Giff. 592. And it seems that the non-fulfilment of an expressed intention would not be a ground for rescinding an executed agreement: *Lamare* v. *Dixon*, L. R. 6 H. L. 414, 428. See, however, *Ex parte Whittaker*, L. R. 10 Ch. 446.

At the same time, if the representation was made, and has not been and cannot be fulfilled, there is a perfectly good defence in a suit for specific performance of the contract. Per Lord Cairns, *Lamare* v. *Dixon*, *supra*, at p. 428; *Beaumont* v. *Dukes*, Jac. 422; *Myers* v. *Watson*, 1 Sim. N. S. 523, are decisions to this effect.

Knowledge and belief.

The assertion of knowledge is to be distinguished from a statement of belief. Thus, if a person affirms that to be true within his own knowledge which he does not know to be true, this is fraudulent; and the fraud consists, not in saying that he believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know. Per Lord Kenyon, *Haycraft* v. *Creasy*, 2 East, 92, 103.

Motive immaterial.

Although the person making the statement had no intention to make a profit for himself, or deliberately to deceive the inquirer, he was held answerable in *Leddell* v. *McDougal*, 29 W. R. 403.

Indefinite representations.

Indefinite representations by a vendor ought to put the purchaser on inquiry, and cannot be relied on as a defence to specific performance. As where a leasehold estate was represented to be "renewable on payment of a *small* fine": *Fenton* v. *Browne*, 14 Ves. 144; where an advowson was sold with a representation that "a voidance of this preferment is likely to occur soon": *Trower*

v. *Newcome*, 3 Mer. 704; where land was described as "uncommonly rich water meadow": *Scott* v. *Hanson*, 1 Russ. & M. 128; where the property was represented as containing a "fine vein of anthracite coal": *Colby* v. *Gadsden*, 34 Beav. 416 (see *Jefferys* v. *Fairs*, 4 Ch. D. 448); where the land was stated to be "fertile and improveable": *Dimmock* v. *Hallett*, L. R. 2 Ch. 21. In these cases the statements were not borne out by the circumstances, but it was considered that there was no misrepresentation of fact which could be recognized by the Court. See also *Flint* v. *Woodin*, 9 Hare, 618, 621.

Simple commendation by vendor.

A vendor is not liable for exaggerated statements as to the value, or the advantages of his property. Thus, in an early case, it was held that an action of deceit would not lie against a vendor who falsely asserted that his land was worth a certain sum, on the ground that it is the purchaser's folly to give credit to such an assertion: *Harvey* v. *Young*, Yelv. 20. See, however, *Wall* v. *Stubbs*, 1 Mad. 80; *Ingram* v. *Thorp*, 7 Hare, 67, 73.

Nor is such a statement a reason for withholding specific performance: *Scott* v. *Hanson*, 1 Sim. 13; 1 Russ. & M. 128.

It is, however, sometimes difficult to draw the line between mere "puff" and misrepresentation.

Thus, in a case where a vendor described the limestone in an unopened quarry as "fit for the London market," Vice-Chancellor Wood held that "a representation was made which went beyond the sort of puffing or speculative commendation which is held excusable in a vendor": *Higgins* v. *Samels*, 2 J. & H. 460; see also *Lord Brooke* v. *Rounthwaite*, 5 Hare, 298. So a statement that the premises were let to a "most desirable tenant" was held not to be *simplex commendatio;* but to entitle the purchaser to rescind on the tenant filing a petition for liquidation before the completion of the contract: *Smith* v. *Land Corporation*, 28 Ch. D. 7.

Disparagement of property by purchaser.

Disparaging statements by the purchaser stand on a similar footing with puffing descriptions by the vendor. See *Tate* v. *Williamson*, L. R. 1 Eq. 528; *ibid.* 2 Ch. 55, 65.

False statement of rental.

Though an action will not lie for saying that a thing is of greater value than it is, because value consists in judgment and

estimation, wherein men many times differ; yet to affirm that a thing is demised for more than it is, is a falsity in his own knowledge, and the party who is deceived may for such deceit have an action: *Ekins* v. *Tresham*, 1 Lev. 102; *Lysney* v. *Selby*, 2 Lord Raym. 1118.

Where the net annual rental was stated to be 47*l.* 10*s.*, and it was in fact only 8*l.*, Willes, J., said, "Even if the misdescription were by mistake, it is one of those gross mistakes to the advantage of the party making it, which in law vitiate a contract": *Wood* v. *Keep*, 1 F. & F. 331. See also *Dimmock* v. *Hallett*, L. R. 2 Ch. 21.

False statement of profits.

Deceitful representations as to the amount of business done in a public-house confer a right of action on the purchaser, if the representations are made pending the treaty, and are relied on by the purchaser: *Dobell* v. *Stevens*, 3 B. & C. 623. See also *Attwood* v. *Small*, 6 Cl. & Fin. 232, 395; *Redgrave* v. *Hurd*, 20 Ch. D. 1.

Fact of valuation.

An agreement entered into on the faith of a false statement as to a valuation of the property, will not be specifically enforced, if the purchaser is induced, by his opinion of the valuer's judgment, to give a higher price than he had previously offered: *Buxton* v. *Lister*, 3 Atk. 383, 386.

Previous offer of property for less.

So specific performance at the suit of the vendor was refused, where in the course of the treaty he had falsely denied that he had put the property in the hands of an agent to sell for much less than he was then asking: *Roots* v. *Snelling*, 48 L. T. 216. A false statement as to the amount of money spent on the property by the vendor may be a ground for rescission: *Ross* v. *Estates Investment Co.*, L. R. 3 Ch. 682.

Catching bargains.

As to that species of fraud which arises from the circumstances and condition of the contracting parties, see notes to *Chesterfield* v. *Janssen*, 1 W. & T. L. C. 592.

Sect. 5.—*The Falsehood of the Statement.*

Onus of proving falsehood.

Unless the statement is false there is, of course, no misrepresentation; and the burthen of proof rests upon the person who alleges that he was deceived: *Smith* v. *Chadwick*, 9 App. Cas. 187.

Ambiguity.

If a representation is capable of two meanings, the person who complains of being deceived is bound to tell the Court which meaning he attached to it: *Ibid.* 20 Ch. D. 64. The misrepresentation chiefly relied on in that case was a statement that, "The present value in the turnover or output of the entire works is over one million sterling per annum." If this meant only that the works were capable of turning out that amount of produce, it was true; but if it meant that any such amount had actually been produced in any one year, or that such a rate of production had ever been attained, it was false. The plaintiff, on being interrogated as to what meaning he attached to the representation, answered that he understood the meaning to be "that which the words obviously conveyed." It was held by the majority of the Lords present that the above statement was ambiguous, that it lay on the plaintiff to prove that he had taken it in the sense in which it was false, and that, not having done so, his action should be dismissed.

For further examples of ambiguous statements, see *Drysdale* v. *Mace*, 5 De G. M. & G. 103; *Dimmock* v. *Hallett*, L. R. 2 Ch. 21; *Hallows* v. *Fernie*, L. R. 3 Ch. 467; *Ross* v. *Estates Investment Co.*, *ibid.* 682; *Mullens* v. *Miller*, 22 Ch. D. 194.

Statement made false by subsequent events.

A statement which is true when made, may be falsified by subsequent events. A vendor, who does not remove the false impression produced by such a statement, cannot insist on specific performance, or resist the rescission of the contract; but he is not liable to an action of deceit: *Arkwright* v. *Newbold*, 17 Ch. D. 301. See also *Davies* v. *London and Provincial Marine Insurance Co.*, 8 Ch. D. 469; and *Brownlie* v. *Campbell*, 5 App. Cas. 925, at p. 950.

Effect of omission.

A mere omission cannot be a false representation, per Jessel, M. R.: *Smith* v. *Chadwick*, 20 Ch. D. 27, 57; but an incomplete statement may, for "half a truth will sometimes

Chap. XXVI. s. 5.

amount to a real falsehood," per Lord Chelmsford, *Peek* v. *Gurney*, L. R. 6 H. L. 377, 392. In the same case, Lord Cairns thus expressed the same doctrine: "Mere non-disclosure of material facts, however morally censurable, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false": p. 403. See also *Arkwright* v. *Newbold*, 17 Ch. D. 301, 317; *Edgington* v. *Fitzmaurice*, 32 W. R. 848; 29 S. J. 320.

Incomplete statement cured by notice.

The falsehood introduced by a partial or fragmentary statement may, it seems, be cured by giving the other party an opportunity of inspecting the whole document. "Suppose," said Jessel, M. R., in *Smith* v. *Chadwick*, *supra*, "that a man states some of the covenants of a lease, but does not state a restrictive covenant against carrying on trade, says nothing about it, but says go and look at the lease, can a purchaser complain? If, on the other hand, he says there is no restrictive covenant, then a purchaser can complain." These principles do not seem to have prevailed in the Irish case of *Stanley* v. *McGauran*, 11 L. R. Ir. 314.

Reckless assertions.

A representation may be actually fraudulent, although the person who makes it has no knowledge of its falsehood, provided it is made recklessly and with a deceitful intention, see *Taylor* v. *Ashton*, 11 M. & W. 401. Per Cotton, L. J., 17 Ch. D. 320; 20 Ch. D. 68; Earl of Selborne, 9 App. Cas. 190.

Sect. 6.—*Legal and Moral Fraud.*

The expressions "legal fraud" and "moral fraud" frequently occur in the reports of cases, and suggest a broad division of all fraud into what is cognizable by law, and what is obnoxious to morals. There is, however, this distinction, that whereas the moral turpitude admits of numberless gradations, there are but

two classes of fraud recognized in Courts of law, viz.—(1) actual or wilful fraud, where the statement is made with knowledge of its falsehood, or made with an utter recklessness as to its truth or falsehood; and (2) what may be called imputed fraud, *i. e.*, where a false statement is made by a person who believes it to be true, but whose duty it is to know whether it is true or false.

Lord Bramwell's doctrine of fraud.

Lord Bramwell (then Lord Justice Bramwell), has expressed the opinion that, with the exception of cases in which the principal is liable for the fraud of his agent, to make a man liable for fraud, moral fraud must be proved against him. "I do not," he says, "understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade:" *Weir* v. *Bell*, 3 Ex. D. 238, 243. And "armed with this authority of Lord Bramwell," Williams, J., rejected "the phrase 'legal fraud,' as distinguished from 'moral fraud and deceit,' as wholly inapplicable and inappropriate to legal discussion:" *Joliffe* v. *Baker*, 11 Q. B. D. 255, 270.

The *dicta* of these learned Judges only mean that the term "fraud" ought not to be applied to cases where there is no intentional deceit, and they do not impugn any of the equitable doctrines as to relief in cases of "imputed" fraud. If, for example, a man made a false statement, believing it to be true, but for reasons to which the Court can give no weight, as his own forgetfulness, or the falsehood of his agent, Lord Bramwell would not attribute to him fraud in any sense, yet he would, it is conceived, hold him liable, in certain circumstances, to make good his representation, or rescind a contract induced thereby.

Actual fraud without knowledge.

It is not necessary in order to constitute actual fraud to bring home to the person making the statement knowledge of its falsehood. Thus, if a false statement is made for a fraudulent purpose by a person who does not believe it to be true, there is "both a legal and a moral fraud:" *Taylor* v. *Ashton*, 11 M. & W. 401. And it has been laid down by Maule, J., that "If a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and, if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law

Chap. XXVI. s. 6.

guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made:" *Evans* v. *Edmonds*, 13 C. B. 777, 786. See also *Hart* v. *Swaine*, 7 Ch. D. 42.

Reckless statements equivalent to actual fraud.

It is a rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue. Per Lord Cairns: *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 79.

Statement made *bonâ fide* may become fraudulent.

A statement made *bonâ fide* may become fraudulent by the after-acquired knowledge of the party who made it. It has been laid down by Lord Blackburn that, "when a statement or representation has been made in the *bonâ fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep silence. That would be fraud, I should say, as at present advised. And I go on further still to say, what is perhaps not quite so clear, but certainly it is my opinion, where there is a duty or an obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also:" *Brownlie* v. *Campbell*, 5 App. Cas. 925, 950; and see *Reynell* v. *Sprye*, 1 De G. M. & G. 656, 709; *Davies* v. *London and Provincial Marine Insurance Co.*, 8 Ch. D. 469, 475.

When silence is fraudulent.

Imputed fraud.

A false statement made *bonâ fide* by a person who ought to know the real state of the case is for some purposes treated as fraudulent.

Thus, a partner has the right to examine the partnership books, and, as between himself and an incoming partner, it is his duty to know their contents. Accordingly, where a person was induced to become a partner in a private bank, by a balance

sheet which understated the liabilities of the firm, he was held entitled, even after the lapse of four years, to rescind the contract, and to be indemnified by the estate of the partner who handed him the balance sheet. The latter was an inactive member of the firm, and was himself a victim to the frauds of a confidential clerk; yet as he took upon himself to represent the state of the bank without having examined the books, his estate was held liable as if he had committed a wilful fraud: *Rawlins* v. *Wickham*, 3 De G. & J. 304.

"This," said Knight Bruce, L. J., in his judgment, "was a representation by Wickham of a fact, of the truth or falsehood of which he knew nothing—and it was a representation which must have formed a material inducement to Rawlins. It has turned out that the representation was contrary to the fact. There was not, as I think, any *moral* fraud, but there was *legal* fraud, and the result of this is, that the estate of Wickham must answer for the fraud."

Forgetfulness.

As the Court cannot "dive into the secret recesses" of men's minds, it holds that forgetfulness is no excuse for misrepresentation: *Burrowes* v. *Lock*, 10 Ves. 470; *Slim* v. *Croucher*, 1 De G. F. & J. 518; *Price* v. *Macaulay*, 2 De G. M. & G. 339; *Brownlie* v. *Campbell*, 5 App. Cas. 925, 936, 945.

Sect. 7.—*Reliance on the Statement.*

State of mind of the parties.

In the last section the state of mind of the person making the representation has been examined with reference to the question of fraud or no fraud. We have now to consider how far the knowledge of the truth, by the person to whom the representation is made, relieves the other party from the consequences of his falsehood.

Knowledge at the time.

If the purchaser knows at the time that the representation is untrue, he is not deceived, and cannot in that case avail himself of the fact that there has been misrepresentation. Per Sir J. Wigram, V.-C., *Lord Brooke* v. *Rounthwaite*, 5 Hare, 298, 306.

Chap. XXVI. s. 7.

See also *Farebrother* v. *Gibson*, 1 De G. & J. 602; *Nelson* v. *Stocker*, 4 De G. & J. 458.

Always a good answer to the charge.

This answer to the charge of misrepresentation is equally available in an action of deceit (*Pasley* v. *Freeman*, 3 T. R. 51), an action for rescission (*Attwood* v. *Small*, 6 Cl. & F. 232), and an action for specific performance (*Dyer* v. *Hargrave*, 10 Ves. 505).

Object of sense.

No action lies for a misrepresentation as to an object of sense: *Pasley* v. *Freeman*, 3 T. R. 51; *Jennings* v. *Broughton*, 5 De G. M. & G. 126.

Dealing with property after knowledge of falsehood.

"In a case depending upon alleged misrepresentation as to the nature and value of the thing purchased, the defendant cannot adduce more conclusive evidence, or raise a more effectual bar to the plaintiff's case, than by showing that the plaintiff was from the beginning cognizant of all the matters complained of, or after full information concerning them, continued to deal with the property, and even to exhaust it in the enjoyment, as by working mines." Per Lord Cottenham: *Vigers* v. *Pike*, 8 Cl. & Fin. 562, 650.

Constructive notice.

The effect of misrepresentation is destroyed by knowledge, but not by constructive notice, of the falsehood of the statement: *Jones* v. *Rimmer*, 14 Ch. D. 588, 590.

Acquaintance with property.

Whether an acquaintance with the property imports such knowledge depends on the nature of the representation. See *King* v. *Wilson*, 6 Beav. 124.

Caveat emptor.

The maxim *caveat emptor* has no application in cases of misrepresentation: *Lowndes* v. *Lane*, 2 Cox, 363; but it has been said that if there be anything in the nature or circumstances of the representation made by the vendors calculated to excite suspicion, or to require explanation or investigation, the purchaser is bound to be on his guard, and must bear the consequences of any negligence on his own part. Per Stuart, V.-C., *Clarke* v. *Mackintosh*, 4 Giff. 134, 155.

Not bound to inquire.

It is clear that a person to whom a definite representation is made is entitled to rely upon its accuracy, and need inquire no further. Thus, if a vendor represents the premises as being "substantial and well built," the purchaser is not bound to examine them for himself. At all events, in a suit for specific

performance, it is no answer to the fact of the plaintiff having made false representations, to say that the defendant was improvident: *Cox* v. *Middleton*, 2 Drew. 209. See also *Browning* v. *Stevens*, 2 C. & P. 337.

Where one contracting party has intentionally misled the other, by describing his rights as being different from what he knew them really to be, it is no answer to the charge of imputed fraud to say, that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other. No man can complain that another has too implicitly relied on the truth of what he has himself stated: *Reynell* v. *Sprye*, 1 De G. M. & G. 656, 710.

Resort to other means of knowledge.

It has been said by Lord Langdale, M.R., that if the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party. Or, if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a Court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded: *Clapham* v. *Shillito*, 7 Beav. 146, 149.

The case in which these observations were made related to a contract for a lease of coal mines, the alleged misrepresentations consisted of statements as to the coal remaining unworked, and the person to whom they were made was an agent of experience, who possessed equal knowledge with the other party. Read by the light of subsequent decisions, the above statement of Lord Langdale must be applied with some caution where the circumstances are not so strongly against the "notion of reliance."

Rule stated.

As a general rule, the person who has made a material misrepresentation, and seeks to avoid its consequences by showing

Chap. XXVI. s. 7.

that the person to whom it was made was not in fact misled by it, must prove either that such person had knowledge of the truth, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation: *Redgrave* v. *Hurd*, 20 Ch. D. 1, 21. See also *Smith* v. *Chadwick*, *ibid.* at p. 44; *Smith* v. *Land Corporation*, 28 Ch. D. 7.

Onus of proof.

In order to enable a vendor to avail himself of the defence, that the purchaser did not rely upon the misrepresentation, he must show very clearly that he knew that to be untrue which was represented to him as true; for no man can be heard to say that he is to be assumed not to have spoken the truth. Per Knight Bruce, L.J.: *Price* v. *Macaulay*, 2 De G. M. & G. 339, 346; *Mathias* v. *Yetts*, 46 L. T. 497.

Sect. 8.—*Suppressio Veri.*

Suppression of truth may be fraudulent.

Fraud may consist as well in the suppression of what is true as in the representation of what is false: *Tapp* v. *Lee*, 3 B. & P. 367, 371. But there is no fraud unless there is "aggressive deceit," or, at all events, a duty to communicate the facts, see *Peek* v. *Gurney*, L. R. 6 H. L. 377; where Lord Chelmsford assumes that mere concealment will not be sufficient to give a right of action to a person who, if the real facts had been known to him, would never have entered into the contract, but that there must be something actively done to deceive him and draw him in to deal with the person withholding the truth from him: p. 391. And Lord Cairns in the same case said: "Mere non-disclosure of material facts, however morally censurable, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation": p. 403.

Action of deceit.

Total silence can never be the foundation of an action of deceit. Thus, it has been held that such an action would not lie against the owner of a house, who knew it to be in a ruinous and unsafe condition, for not disclosing the fact to a proposed tenant, who wanted the house for immediate occupation: *Keates* v. *Cadogan*, 10 C. B. 591; and see, as to the passive acquiescence

of the vendor in the self-deception of a buyer, *Smith* v. *Hughes*, L. R. 6 Q. B. 597. But a partial statement may, by the omission of some qualifying term, be as false and fraudulent as a deliberate lie. See *Arkwright* v. *Newbold*, 17 Ch. D. 301, 318; *Smith* v. *Chadwick*, 20 Ch. D. 27, 57.

Rescission.

In the case of *suppressio veri*—and the remark holds good in all cases of misrepresentation—the action of deceit must be carefully distinguished from actions for rescission and specific performance. "There are," said Lord Justice James, "a number of purely equitable considerations, which arise when the Courts are dealing with actions to set aside contracts or conveyances which have been obtained by means of misrepresentation of a fact, or by means of concealment, or suppression of a fact which, in the opinion of the Court, ought to have been stated. Those cases stand by themselves, and are entirely distinct from such a case as we have before us": *Arkwright* v. *Newbold*, 17 Ch. D. 301, 317.

Duty to communicate facts.

Concealment of a fact, which it is the duty of one party to communicate to the other, is a ground for rescission.

This duty seems to exist, as between vendor and purchaser, only in two cases—(1) where there is a fiduciary relationship; (2) where there is a latent defect.

i. Fiduciary relationship.

An agent for sale (and the proposition is equally true of any person occupying a fiduciary position towards the vendor), cannot purchase, unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed: *Lowther* v. *Lowther*, 13 Ves. 95, 103; *Tate* v. *Williamson*, L. R. 2 Ch. 55.

Agent secretly purchasing.

There have been cases where an estate has been sold to one who was agent for another, the vendor not being aware of the agency; still he cannot, on that account, get rid of the contract; for it is of no consequence to him which of them has it. But when the secret purchaser is himself the agent of the vendor, then he has no one to deal with, and no contract can be made. Per Sir T. Plumer, M. R.: *Woodhouse* v. *Meredith*, 1 Jac. & W. 204, 223.

Although the sale is free from everything else that is obnoxious, the mere concealment from the client that the real

purchaser is his law agent, is sufficient to avoid the contract: *Lewis* v. *Hillman*, 3 H. L. C. 607, 630. See also *Murphy* v. *O'Shea*, 2 J. & Lat. 422; *McPherson* v. *Watt*, 3 App. Cas. 254.

And the sale of his own property by an agent for purchase to his principal, without disclosing the fact that it was his own, is a transaction which the principal may set aside: *Re Cape Breton Co.*, 26 Ch. D. 221.

As to the measure of damages in such a case, see *Kimber* v. *Barber*, L. R. 8 Ch. 56; *Waddell* v. *Blockey*, 4 Q. B. D. 678.

Leave to bid.

An order giving a solicitor leave to bid puts an end to the fiduciary relationship previously existing between him and his client, but he must either remain silent, or disclose to the Court all facts within his knowledge affecting the value of the property: *Boswell* v. *Coaks*, 27 Ch. D. 424.

Agent of one party dealing secretly with the other.

Closely connected with the cases where an agent for sale himself becomes the purchaser, are those in which the fraud consists of a secret bargain between an agent for sale, or other fiduciary vendor, and the purchaser of the property, securing to the former a benefit on the sale. In such a case "It is not enough for an agent to tell the principal that he is going to have an interest in the purchase, to have a part in the purchase. He must tell him all the material facts. He must make a full disclosure."—Per Jessel, M. R.: *Dunne* v. *English*, L. R. 18 Eq. 524, 533. And see *Panama, &c. Telegraph Co.* v. *India Rubber, &c. Works Co.*, L. R. 10 Ch. 515; *Morgan* v. *Elford*, 4 Ch. D. 352; affd. D. P. W. N. 1877, 163.

Promoters of a company.

On a similar principle promoters of a company, who stand in a fiduciary position towards the company, are not entitled to retain secret profits on a transaction in which they act as promoters: see *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, and cases there cited. See also *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918; *Emma Silver Mining Co.* v. *Lewis*, 4 C. P. D. 396; *Whaley Bridge Calico Printing Co.* v. *Green*, 5 Q. B. D. 109.

"Commission received by an agent or trustee of a purchaser from a vendor without the knowledge of his principal is a bribe—it is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge."—Per

James, L. J.: *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394, 457. And such a liability of the agent is a debt incurred by "fraud," as well as by a "breach of trust," within the meaning of sect. 49 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71): *Emma Silver Mining Co.* v. *Grant*, 17 Ch. D. 122.

Tenant for life.

A tenant for life may purchase the property from trustees with a power of sale, even though his consent is required to the exercise of the power; but it seems that, although, in such a transaction, he stands in no fiduciary position towards the remaindermen, he may be under some obligation to communicate to the trustees circumstances which he knows, and which he knows the trustees do not know—Per James, L. J.: *Dicconson* v. *Talbot*, L. R. 6 Ch. 32, 37.

ii. Latent defects.

A vendor is under no obligation to mention patent defects in the property. But if there be a defect which is known to the vendor, and which the purchaser could not possibly discover by inspection, it must be disclosed: *ante*, p. 349.

Wilde v. *Gibson*.

In a celebrated case (*Wilde* v. *Gibson*, 1 H. L. C. 605) the vendor had constructive notice, but not actual knowledge of the existence of a right of way which materially affected the value of the property. The fact was not communicated to the purchaser, and was only discovered by him after conveyance. His bill, however, for the rescission of the conveyance was dismissed with costs, on the ground that, to set aside a purchase, perfected by conveyance and payment of the purchase-money, for fraudulent concealment of a defect in title, there must be proof of actual fraud. "If there be," said Lord Campbell, "misrepresentation or concealment, which is material to the purchaser, a Court of equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend that a Court of equity will set aside the conveyance only on the ground of actual fraud:" p. 632.

This decision and the *dicta* of the Lords who decided it, have been severely criticized by Lord St. Leonards (Sugden's Law of Property, pp. 614—649); and have been questioned by other eminent authorities: see Fry, Specific Performance, 295; Dart, 801.

Non-disclo-

A vendor is not bound to tell a purchaser of a mine that it

Chap. XXVI. s. 8.

had been previously worked and found unprofitable: *Haywood* v. *Cope*, 25 Beav. 140.

sure by vendor.

On the sale of an *advowson* the vendor need not disclose a charge on the *living*: *Edwards-Wood* v. *Majoribanks*, 7 H. L. C. 806.

Industrious concealment.

An "industrious concealment," on the part of the vendor, of a liability to repair a river wall, disentitles him to specific performance: *Shirley* v. *Stratton*, 1 Bro. C. C. 440.

Non-disclosure by a purchaser.

A purchaser is not bound to tell the vendor of the advantages pertaining to the property.

"There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however it may be viewed by moralists. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be a sufficient ground for a Court of equity to refuse a decree for a specific performance of the agreement"—Per Lord Campbell, L. C.: *Walters* v. *Morgan*, 3 De G. F. & J. 718, 723. See also *Turner* v. *Harvey*, Jac. 169, 178; *Ellard* v. *Lord Llandaff*, 1 Ball & B. 241.

A bar to specific performance.

Where the purchasers owned adjoining property and had worked a considerable portion of the coal under the vendor's land without the knowledge of the latter, it was held that a contract for the purchase of the partially gutted property could not be specifically enforced at the suit of the trespassers. The ground of the decision was that the purchasers suppressed the fact of their having wrongfully got a large quantity of the vendor's coal, and so given him a heavy pecuniary claim against them: *Phillips* v. *Homfray*, L. R. 6 Ch. 770.

SECT. 9.—*The Remedies of the Person deceived.*

Personal bar.

Fraud and misrepresentation operate as a personal bar to the relief. Per Lord Lyndhurst: *Harris* v. *Kemble*, 5 Bli. N. S. 730, 751. The Court will never decree specific performance unless the case of the plaintiff is perfectly clear from circumvention and deceit: *Davis* v. *Symonds*, 1 Cox, 402, 407. See also *Harnett* v. *Yeilding*, 2 Sch. & L. 549.

The principle on which performance of an agreement is compelled, requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame. Misrepresentation, even as to a small part only, prevents him from applying to the Court for relief. Per Sir T. Plumer, M. R.: *Clermont* v. *Tasburgh*, 1 Jac. & W. 112, 119.

As to fraud as a defence to specific performance, see Ch. XXVII., *Parol Evidence*, p. 425.

Effect on the contract.

Besides the personal disqualification imposed by fraud, its effect on the contract has also to be considered. The general rule is, as expressed by Lord Cranworth, L. J., "Once make out that there has been anything like deception, and no contract, resting in any degree on that foundation, can stand:" *Reynell* v. *Sprye*, 1 De G. M. & G. 656, 708.

Voidable, not void.

Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the person defrauded: *Urquhart* v. *Macpherson*, 3 App. Cas. 831. See also *White* v. *Garden*, 10 C. B. 919; *Stevenson* v. *Newnham*, 13 C. B. 285; *Kingsford* v. *Merry*, 1 H. & N. 503; *Clarke* v. *Dickson*, E. B. & E. 148; *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64; *Clough* v. *L. & N. W. Ry. Co.*, L. R. 7 Ex. 26; *Dawes* v. *Harness*, L. R. 10 C. P. 166. See also Ch. XXX.

Action of deceit.

There is another important effect of fraud which is independent of contract, namely, the right of action which it confers on any person damaged thereby. This will be more fully considered under the head of *Action of Deceit*, *post*, Ch. XXIX.

Remedy for fraud.

It has been already stated, that fraud is to be regarded as either "actual" or "imputed;" and the importance of that

Chap. XXVI. s. 9.

classification consists in this, that the remedies are not co-extensive in the two cases.

Actual fraud.

Thus for actual or "moral" fraud an action of deceit may be maintained. It is also a ground for rescission of the contract, and a good defence to an action by the fraudulent party either for specific performance or for damages. And it may be mentioned that (with the exception of the peculiar case, where a principal is held liable for the fraud of his agent, see *ante*, p. 388), the action of deceit cannot be maintained without proof of actual fraud: *Smith* v. *Chadwick*, 9 App. Cas. 187.

Of imputed fraud.

Imputed fraud, on the other hand, while it gives no right of action for deceit, may entitle the person deceived to rescind the contract, even after it has been executed: *Rawlins* v. *Wickham*, 3 De G. & J. 304, and see *post*, Ch. XXX. And, like actual fraud, is a good defence to an action founded on the contract.

Innocent misrepresentation.

It is only when the mis-statement is made honestly, upon reasonable grounds, and the person who makes it is under no obligation to know the truth, that the misrepresentation can be said to be innocent. There is in such a case no fraud, and the rights of the person deceived seem to be to resist specific performance, or, before completion, to rescind the contract. See *Higgins* v. *Samels*, 2 J. & H. 460.

Sect. 10.—*Laches and Delay.*

Time at which the fraud is discovered.

A person deceived may be deprived of his remedy by acquiescence or delay. Acquiescence implies knowledge of the circumstances by the person to be bound; and the date when this knowledge is acquired has an important bearing, in the case of fraud or misrepresentation, upon the rights of the parties. Three periods must be considered:

(1) The period from the commencement of the treaty to the signature of the agreement.

(2) The period from the signature of the agreement until the completion of the contract.

(3) The period after completion.

Before agreement.

If the party to whom the misrepresentation is made discovers

the truth during the treaty, and afterwards enters into the agreement, he has nothing to complain of; for as has been already stated *ante*, p. 405, the knowledge of the truth cures the misrepresentation.

Before completion.

Again, if the discovery is made pending completion, the party deceived has three courses open to him:

(1) He may confirm the contract, waiving all rights in respect of the misrepresentation.

(2) He may require the other party to make good his representation, or pay compensation for the deficiency in value.

(3) He may rescind the contract and recover his deposit.

Waiver by proceeding with the purchase.

When the purchaser discovers a defect in the title, or in the estate, which the vendor ought to have communicated, and which gives him a right to rescind, he will be held to have waived both the right to rescind, and the right to compensation if after discovery he enters into possession, or completes the purchase (*Burnell* v. *Brown*, 1 J. & W. 168; see, however, *Hughes* v. *Jones*, 3 De G. F. & J. 307); or proceeds with the purchase without raising any objection: *Fordyce* v. *Ford*, 4 Bro. C. C. 494. If the misrepresentation is such as to support an action of deceit, it is conceived that completing the purchase after discovery of the fraud will not take away the right of action.

After conveyance.

When the purchaser discovers the fraud after conveyance, he should act promptly if he desires to rescind the contract.

Claim for rescission must be promptly made.

The right to relief by rescission depends on purely equitable principles, and two circumstances, always important in such cases, are the length of the delay, and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. Per *Curiam*, *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, 240.

But if a contract is obtained by fraud, it is for the party defrauded to elect whether he will be bound or not; and until he has actual knowledge of the fraud, not merely the means of acquiring such knowledge, he is not in a position to exercise such right. See *Rawlins* v. *Wickham*, 3 De G. & J. 304.

CHAPTER XXVII.

MISTAKE.

SECT.		PAGE
1.	*Contracts entered into by mistake*	416
	i. *Common mistake*	417
	ii. *Mistake of one party*	418
2.	*Mistake in the written agreement*	421
	i. *Parol evidence on behalf of the plaintiff*	421
	ii. *Parol evidence on behalf of the defendant*	423
	iii. *Subsequent parol variations*	426
3.	*Procedure in cases of mistake*	429
4.	*Rectification*	430
	i. *Of agreements*	430
	ii. *Of conveyances*	431
	iii. *Requisite evidence*	433
	iv. *Reconveyance*	434
	v. *Settlements*	436
5.	*Mistakes of fact and mistakes of law*	437

SECT. 1.—*Contracts entered into by Mistake.*

Division of the subject.

IT is expedient to distinguish two kinds of error which are included in the common term, mistake. A person enters into a contract by mistake, when his belief as to a material circumstance is contrary to the fact, whereas a mistake may be said to occur in an instrument when it fails to express the real agreement of the parties.

The latter, again, is divisible into mistakes in the agreement and mistakes in the conveyance, which for clearness must be treated separately.

It will be convenient to take the subjects in the order of time, as they might naturally be expected to arise in the course of a treaty for sale and purchase of land, commencing with the case in which the vendor or the purchaser, or both, labour under a mistake at the date of the contract.

Common mistake.

Where the contract has proceeded upon the mistake of *both* parties that avoids the contract at law as well as in equity. Per Lord Erskine, L. C., *Stapylton* v. *Scott*, 13 Ves. 425.

Estate tail barred.

Thus, where the subject of the sale was a remainder in fee expectant on an estate tail, and at the date of the contract the estate tail had been barred, a fact which was not within the knowledge of either party, the contract was rescinded on the ground of mistake: *Hitchcock* v. *Giddings*, 4 Price, 135.

Non-existent subject.

Richards, C. B., in this case said:—"Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact, am I to be allowed to receive the purchase-money when, in point of fact, I had not an inch of land to sell?"

Uncertain subject.

A contract, however, for the sale and purchase of a property, the extent and boundaries of which are understood by both parties to be uncertain, is valid, and may be specifically enforced: *Baxendale* v. *Seale*, 19 Beav. 601.

So, an agreement to take a lease of a vein of coal may be enforced, although it should turn out that the vein of coal was non-existent, if the lessor did not guarantee that the particular vein existed, or that coal was to be found under the property: *Jefferys* v. *Fairs*, 4 Ch. D. 448.

Reversion falling into possession.

A contract for the purchase of a reversion cannot be enforced if at the time of the contract it had fallen into possession: *Colyer* v. *Clay*, 7 Beav. 188.

On a similar principle, where the assignee of a tenant for life without impeachment of waste entered into an agreement with the tenant in tail next in remainder as to the cutting of the timber on the estate, and the tenant for life had died in India before the date of the agreement, it was held that the agreement was founded on a mistake, was without consideration, and could not therefore be enforced: *Cochrane* v. *Willis*, L. R. 1 Ch. 58.

Purchase of a man's own estate.

In an early case where a man bought and paid for an estate which really belonged to himself, the purchase-money was ordered to be refunded: *Bingham* v. *Bingham*, 1 Ves. sen. 126; and *à fortiori* such a contract will not be specifically enforced: *Jones* v. *Clifford*, 3 Ch. D. 779; see also *Cooper* v. *Phibbs*, L. R. 2 H. L. 149.

Chap. XXVII. s. 1.

Mistake of one party not in general a ground for relief.

The mistake of one party or his agent does not, as a general rule, avoid the contract, or constitute a valid defence to an action for specific performance: *Morley* v. *Clavering*, 29 Beav. 84; *McKenzie* v. *Hesketh*, 7 Ch. D. 675; *Tamplin* v. *James*, 15 Ch. D. 215; *Dyas* v. *Stafford*, 7 L. R. Ir. 590; *Goddard* v. *Jeffreys*, 30 W. R. 269; but see *Paget* v. *Marshall*, 28 Ch. D. 255.

Nor is the mistake of the vendor's agent a ground for opening the biddings: *Griffiths* v. *Jones*, L. R. 15 Eq. 279.

In a case where a purchaser was misled by his own knowledge of the property, he was not relieved from his bargain: *Fairhead* v. *Southee*, 11 W. R. 739; *Tamplin* v. *James*, *supra*.

Exceptions to the rule.

There are, however, two exceptions to this rule, namely, (1) where the hardship of enforcing the contract would amount to injustice; and (2) where the mistake has been occasioned not solely by the carelessness of the defendant, but wholly or in part by the default of the plaintiff.

i. Hardship.

Thus, on the ground of hardship, specific performance was refused without prejudice to the plaintiff's rights at law, where the purchaser bid by mistake for the wrong lot, and immediately after it had been knocked down to him repudiated the purchase: *Malins* v. *Freeman*, 2 Keen, 25.

So where, through the carelessness of the auctioneer, the contract was signed on a copy of the particulars which had not been altered in accordance with the instructions of the vendor, so as to reserve a right of way to his other premises: *Manser* v. *Back*, 6 Hare, 443; see *Day* v. *Wells*, 30 Beav. 220; and again, where the vendor, in his hurry to save the post, made a mistake in the addition of certain figures, which had the effect of fixing the price at 1,000*l.* less than he intended: *Webster* v. *Cecil*, 30 Beav. 62. See also *Faine* v. *Brown*, cited 2 Ves. sen. 307; *Howel* v. *George*, 1 Mad. 1; *Wedgwood* v. *Adams*, 6 Beav. 600; *Bray* v. *Briggs*, 20 W. R. 962. See, as to these cases, the remarks of Lord Justice James, in *Tamplin* v. *James*, 15 Ch. D. 215, 221.

Remedies of the vendor.

If property not intended to be sold be, by the ignorance or neglect of the vendor's agent, included in a contract for sale with other property intended to be sold, a case may arise in which the Court would refuse to compel a specific performance of the whole contract, but it certainly would not rescind the

contract: per Lord Cottenham, L.C., *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1, 7; see also *Leslie* v. *Tompson*, 9 Hare, 268, where Wood, V.-C., was disposed to think that, in the special circumstances of that case, a bill might have been filed by the vendors to have the contract cancelled.

Where a vendor agreed to sell "all that garden, thirteen yards in width and eighteen in length, or thereabouts, to be measured," and the width of the garden had been slightly diminished at each end by the erection of buildings, which were essential to the trade of an innkeeper carried on by the vendor in the adjoining premises, the plaintiff's bill, insisting on a conveyance of a rectangular area, including the buildings, was dismissed, on the ground that, even if the description of the premises clearly included the buildings, the defendant had contracted in error and could not be compelled to complete: *Neap* v. *Abbott*, C. P. Coop. Ch. Pr. 333; see also *Howel* v. *George*, 1 Mad. 1.

ii. Mistake of purchaser induced by vendor.

The cases in which the mistake of the purchaser has been caused by the misdescription of the property, or the misrepresentations of the vendor, have been already considered; see Chapters XXV. and XXVI. But, without actual misdescription or misrepresentation, the contract may be ambiguous, and the purchaser thereby led into error. In such cases "the principle upon which the Court proceeds is this: if it appears upon the evidence that there was, in the description of the property, a matter on which a person might *bonâ fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, the Court cannot enforce specific performance against him. If there appear on the particulars no ground for the mistake—if no man with his senses about him could have misapprehended the character of the parcels—then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about:" per Lord Romilly, M.R., *Swaisland* v. *Dearsley*, 29 Beav. 430, 433; see also *Wycombe Ry. Co.* v. *Donnington Hospital*, L. R. 1 Ch. 268.

Misleading

An improper and misleading description of the property in

Chap. XXVII. s. 1.

descriptions of the property.

the particulars gives the purchaser the right to rescind the contract, and the burden of proving that he was not in fact misled by such a misdescription lies on the vendor: *Torrance* v. *Bolton*, L. R. 8 Ch. 118; *Re Arnold*, 14 Ch. D. 270; *Jones* v. *Rimmer*, 14 Ch. D. 588.

Ambiguity in description.

It was laid down in very general terms by Lord Thurlow, that "if one party thought he had purchased *bonâ fide*, and the other party thought he had not sold, that is a ground to set aside the contract, that neither party may be damaged:" *Calverley* v. *Williams*, 1 Ves. jun. 210, 211. But it is conceived that this *dictum* should be qualified by the condition, that the terms of the written agreement must be ambiguous. If the Court comes to the conclusion, on the construction of the agreement, that no reasonable man could be misled by the description, it will not listen to the suggestion that either party thought he was buying or selling something different from that which is included in the agreement.

Legal effect of agreement.

A mistake as to the legal effect of the agreement does not prevent the other party from enforcing specific performance. Thus, where the contract for a lease specified the term to be seven or fourteen years, the lessee was held entitled to a lease in conformity with the agreement, although the term thus created was determinable at the expiration of the shorter period by the lessee, and not by the lessor, as the latter intended: *Powell* v. *Smith*, 14 Eq. 85.

It is to be observed, with reference to this case, that the parties were at one only with reference to the formula of words to be adopted, and that, according to the evidence of the defendant, there never was any *consensus ad idem* as to the length of the term.

Sect. 2.—*Mistake in the Written Agreement.*

Where agreement does not express the real contract.

A mistake may be said to exist in the written agreement when it fails to express the real contract of the parties. This may arise either by the omission or variation of some term of the contract, or by the introduction of a term which did not originally form part of it.

Parol terms added to agreement.

It will be convenient also to consider under this head the cases in which, at or after the date of the contract, the parties have agreed by parol to modify the terms of the written agreement.

Parol evidence not received to vary written contract.

The plaintiff cannot as a rule adduce parol evidence to vary the written agreement. By the general rules of the common law, if there be a contract which has been reduced into writing, parol evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify, the written contract: per Denman, C. J., *Goss* v. *Lord Nugent*, 2 Nev. & M. 28, 33.

Sir W. Grant's statement of the rule.

And to the same effect is the following statement by Sir W. Grant, M. R.: By the rule of law, independent of the Statute of Frauds, parol evidence cannot be received to contradict a written agreement. Though the written instrument does not contain the terms, it must, in contemplation of law, be taken to contain the agreement, as furnishing better evidence than any parol can supply. Thus stands the rule of law. But when equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show that under the circumstances the plaintiff is not entitled to have the agreement specifically performed: *Woollam* v. *Hearn*, 7 Ves. 211, 218. See also *Parteriche* v. *Powlet*, 2 Atk. 383.

The distinction between a plaintiff seeking to enforce a written agreement with a parol variation, and a defendant adducing parol evidence to show that the written agreement does not contain the true contract, is one of great practical importance.

Chap. XXVII. s. 2.

For it is now well established that parol evidence may, in general, be adduced by the defendant, but not by the plaintiff.

Exclusion of parol evidence on behalf of the plaintiff.

Thus parol evidence on the part of the plaintiff has been rejected where he sought to show that part of the premises comprised in the agreement had, by the joint direction of the parties, been left out of the lease: *Lawson* v. *Laude*, 1 Dick. 346; and also where it was attempted to prove that an annuity was redeemable, the proviso for redemption having been deliberately omitted under the impression that it would render the transaction usurious: *Irnham* v. *Child*, 1 Bro. C. C. 92; *Portmore* v. *Morris*, 2 Bro. C. C. 219; *Hare* v. *Shearwood*, 3 Bro. C. C. 168; or that a lease was to commence at a different date from that fixed in the agreement: *Jordan* v. *Sawkins*, 3 Bro. C. C. 388; or that the rent should have been expressed to be *clear of all taxes*: *Rich* v. *Jackson*, 4 Bro. C. C. 514; see, however, *Joynes* v. *Statham*, 3 Atk. 388; or that the rent should have been different from that expressed: *Woollam* v. *Hearn*, 7 Ves. 211.

Exceptions.

The exceptions to the foregoing rules, which exclude parol evidence on the part of the plaintiff in an action of specific performance, are as follows:—

i. Latent ambiguity.

1. A plaintiff may adduce parol evidence to explain a latent ambiguity, and obtain specific performance of the agreement so explained: *Murray* v. *Parker*, 19 Beav. 305; and see *Colpoys* v. *Colpoys*, Jac. 451, 463; Sug. V. & P. 169.

In a case where the agreement was for a lease at 9*l.* per annum, but the lessor insisted that this rent was to be clear of taxes, and that a stipulation to that effect had been omitted by mistake, Lord Hardwicke is reported to have said: "Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the Court:" *Joynes* v. *Statham*, 3 Atk. 388.

The parol evidence must not only remove the ambiguity, but also show that the term was understood by both parties in the same sense. Otherwise there would be no contract to enforce: *Baxendale* v. *Seale*, 19 Beav. 601, 609.

Evidence is of course not admissible to explain a patent ambiguity. See *Jenkinson* v. *Pepys*, cited 6 Ves. 330; *Higginson* v. *Clowes*, 15 Ves. 516.

Patent ambiguity.

2. If the parties agree to alter some term of the written agreement, and the substituted parol agreement is in part performed, the plaintiff may enforce specific performance of the original agreement with the parol variation: *Anon.*, 5 Vin. Abr. 522, pl. 38. See *Walker* v. *Walker*, 2 Atk. 98; *Clifford* v. *Turrell*, 1 Y. & C. C. 138. But the part performance must be in execution of the contract as varied. If it is consistent with the original agreement it gives no validity to the parol variation. See *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1.

ii. Part performance.

3. Parol evidence may, it would seem, be admitted on the part of the plaintiff to rebut an equity (*e. g.*, a claim for compensation), set up by the defendant: *Winch* v. *Winchester*, 1 Ves. & B. 375, 378.

iii. To rebut an equity.

It should be mentioned that Lord Justice Fry, in his work on Specific Performance, expresses the opinion that "with regard to a mistake of both parties to a contract in the reduction of the contract into writing, there can be no objection in point of justice to the plaintiff's asking to have that mistake corrected, and to have the real contract carried into execution:" p. 346. And he does not regard the current of authorities as uniform in favour of the position that the plaintiff can never avail himself of a parol variation: p. 350.

Townshend v. *Stangroom.*

No case illustrates more forcibly the difference between the positions of plaintiff and defendant as to parol evidence than *The Marquis of Townshend* v. *Stangroom*, 6 Ves. 328. For there the lessor's bill for specific performance of a written agreement with a parol variation, and the cross bill by the lessee for specific performance of the written agreement without the variation, were both dismissed by Lord Eldon; the evidence, which was rejected in the first, being admitted by way of defence in the second suit.

Omission.

The defendant may always show that by fraud, mistake or surprise, some term has been omitted from the written agreement: *Joynes* v. *Statham*, 3 Atk. 388; *Wood* v. *Scarth*, 2 K. & J. 33; *Barnard* v. *Cave*, 26 Beav. 253.

Chap. XXVII. s. 2.

It is incumbent on the plaintiff, in such a suit, to satisfy the Court that he is entitled to specific performance of the very agreement stated in the bill; insisting on a written contract the question must be, is that written contract conformable to the actual contract? It is certainly competent to the defendant to show, that by fraud, or mistake, or otherwise, the written contract and the actual contract differ: per Sir T. Plumer, *Garrard* v. *Grinling*, 2 Sw. 244, 248.

Where the attorney of the vendor, acting on verbal instructions, framed the agreement in words which, he thought, sufficiently expressed the intention of the parties, but which in the opinion of the Court had a more limited meaning, the case was treated as if a term had been omitted, and the plaintiff was put to his election either to perform the agreement as the defendant desired, or to have his bill dismissed: *Ramsbottom* v. *Gosden*, 1 Ves. & B. 165.

Error in agreement.

So if by fraud, mistake, or surprise, a new term is introduced contrary to the real contract of the parties, or a substantial variation is made in some term, the defendant may resist the specific performance of the written agreement.

Thus, where a mortgagee who had obtained a foreclosure decree contracted to sell the property, and a clause was inadvertently inserted in the agreement, providing that "the vendor, being a mortgagee with power of sale, shall enter into no covenant for title, except the usual covenant against incumbrances," it was held that the vendor, never having intended to run the risk of opening the foreclosure by conveying under the power, could not be compelled to execute a conveyance in that form: *Watson* v. *Marston*, 4 De G. M. & G. 230; *Webster* v. *Cecil*, 30 Beav. 62.

Mistake of a third person in drawing up agreement.

So, if two persons entrust a third person to draw up minutes of their intention, and such person does not draw them according to such intention, that case might be relieved; for that would be a kind of fraud. It must be an essential ingredient to any relief under this head, that it should be an accident perfectly distinct from the sense of the instrument. So on the head of ambiguity; if there be a latent ambiguity, it must be explained by parol evidence; for though the words do not *primâ*

facie import an ambiguity, yet if such ambiguity can be made to appear from parol evidence, it must be admitted to explain it, as well as to raise it: but if words have in themselves a positive precise sense, I have no idea of its being possible to change them, and I take it to be an established rule that words cannot be changed in that manner:" per Lord Thurlow, L. C., *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 338, 350.

Contemporaneous parol agreement.

It is a kind of fraud in the plaintiff to set up a written agreement and repudiate a parol variation in favour of the defendant, on the faith of which he signed the agreement. Accordingly the defendant is allowed to adduce evidence of a contemporaneous parol agreement contradicting the terms of the written agreement: *Clarke* v. *Grant*, 14 Ves. 519; and, *à fortiori*, evidence may be admitted to prove a collateral parol agreement on the faith of which the written contract was signed: *Morgan* v. *Griffith*, L. R. 6 Ex. 70; *Erskine* v. *Adeane*, L. R. 8 Ch. 756; *Angell* v. *Duke*, L. R., 10 Q. B. 174.

But in order to induce the Court to refrain from decreeing specific performance of the written agreement, the parol addition must be established without doubt or ambiguity: *Vouillon* v. *States*, 25 L. J. Ch. 875.

Admission of parol evidence in defence an exception to the general rule.

The admission of parol evidence on the part of a defendant as a defence, rests entirely on the peculiar jurisdiction of equity in actions for specific performance, a jurisdiction which will not be exercised unless all the circumstances render it perfectly fair to enforce the agreement. It must be recognized as an exception to the general law, according to which parol evidence is not admitted to vary a written agreement: see *Preston* v. *Merceau*, 2 W. Bl. 1249.

Exceptions.

Even as a defence, evidence is not always admissible to show that the real contract is different from that contained in the written agreement.

Omitted terms.

Thus, where the parties deliberately leave out of the written agreement some term of their contract, the omission cannot be pleaded as a defence: *Omerod* v. *Hardman*, 5 Ves. 722, 730; *London and Birmingham Rail. Co.* v. *Winter*, Cr. & Ph. 57. So, an omission during the treaty to propose a particular stipulation, as, for example, the payment of tithe rent-charge by the lessee,

Chap. XXVII. s. 2.

will not be a defence to specific performance: *Parker* v. *Taswell*, 2 De G. & J. 559; nor will the mistake of the defendant as to the legal effect of the agreement: *Powell* v. *Smith*, L. R. 14 Eq. 85.

Parol evidence not admitted to alter the substance of the contract.

The intention of the parties must be collected from the expressions in the written instrument, and no evidence *aliunde* can be received to contradict the plain import of those expressions.

A sale and a purchase not treated as an exchange.

A memorandum of agreement contained two contracts, one a sale by the plaintiff to the defendant, the other a sale by the defendant to the plaintiff. They were not expressed to be mutually dependent, and in an action for the specific performance of one of the contracts, the title to the other estate having proved defective, evidence was not admitted to show that the real agreement was for an exchange: *Croome* v. *Lediard*, 2 Myl. & K. 251.

Joint purchase.

So, parol evidence on behalf of the defendant was rejected, where its object was to show that what was apparently a joint purchase by two, was in reality, as to one of them, a security only for so much of the purchase-money as he should advance: *Davis* v. *Symonds*, 1 Cox, 402. But if the construction be doubtful, parol evidence is admissible: *Gordon* v. *Hertford*, 2 Mad. 106. See also *Callaghan* v. *Callaghan*, 8 Cl. & Fin. 374.

Subsequent parol variation.

A subsequent parol variation does not furnish a defence to an action for specific performance of the original contract: *Price* v. *Dyer*, 17 Ves. 356; unless the variations have been so acted upon that the original contract cannot be enforced without injury to one party: *Legal* v. *Miller*, 2 Ves. sen. 299.

An agreement to vary a contract is in itself a new contract, and must be enforceable as such. When it relates to land, it must be in writing, and signed by the party to be charged, or else come within the doctrine of part performance. It must also be supported by a new consideration; for a mere concession by one party to the other would be, it is conceived, *nudum pactum*. See *Robson* v. *Collins*, 7 Ves. 130.

Somewhat inconsistently, it has been held, that although the parties cannot vary, they may rescind a written contract by a subsequent parol agreement; see next page. But a parol agreement to rescind, which forms part of an ineffectual attempt

to enter into a new contract, will not be held valid. Negotiations for a variation of terms will not, as a general rule, amount to a waiver of the original contract: *Robinson* v. *Page*, 3 Russ. 114.

Written agreement discharged by parol.

An agreement in writing may be discharged by parol: *Goman* v. *Salisbury*, 1 Vern. 240; *Gibbons* v. *Caunt*, 4 Ves. 840, 848. But "the Court requires as clear evidence of the waiver as of the existence of the contract itself, and will not act upon less:" *Carolan* v. *Brabazon*, 3 J. & Lat. 200, 209.

Although Lord Hardwicke is reported to have said, "An agreement to waive a purchase contract is as much an agreement concerning lands as the original contract (*Buckhouse* v. *Crossby*, 2 Eq. Ca. Abr. 32), yet it seems clearly settled that, even where the subject-matter of the contract is land, a waiver which amounts to an entire abandonment and dissolution of the contract may be by parol: *Price* v. *Dyer*, 17 Ves. 356; and see *Davis* v. *Symonds*, 1 Cox, 402, 406; *Jordan* v. *Sawkins*, 1 Ves. jun. 402; *Goss* v. *Lord Nugent*, 2 Nev. & M. 28; *Robinson* v. *Page*, 3 Russ. 114.

Parol waiver a good defence.

At all events, in an action for specific performance of a written agreement, parol waiver is a good *defence*: *Bell* v. *Howard*, 9 Mod. 302; *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 375. And the waiver may be implied from a subsequent inconsistent agreement: *Legal* v. *Miller*, 2 Ves. sen. 299; *Moore* v. *Marrable*, L. R. 1 Ch. 217.

Agreement on condition.

Evidence may be brought to show that an agreement was intended only to take effect upon a condition, just as an instrument may be proved not to be a deed, as it appears to be, but only an escrow: *Druiff* v. *Parker*, L. R. 5 Eq. 131.

The evidence must be conclusive.

In order to prove that the words taken down in writing were contrary to the concurrent intention of all parties, there must be "strong irrefragable evidence:" *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 338, 341. "There ought to be the strongest proof possible:" per Lord Hardwicke, *Henkle* v. *Royal Exchange Assurance Co.*, 1 Ves. sen. 317, 319; a saying which, in the language of Lord Eldon, "leaves a weighty caution to future judges:" *Townshend* v. *Stangroom*, 6 Ves. 328, 333. In that case, Lord Eldon also says: "I agree, those producing evidence

Chap. XXVII. s. 2.

of mistake or surprise, either to rectify an agreement, or calling upon the Court to refuse a specific performance, undertake a case of great difficulty; but it does not follow that it is therefore incompetent to prove the actual existence of it by evidence:" 6 Ves. 339.

There is considerable difficulty in the application of evidence, under the head of mistake or surprise, calling for great caution, especially upon sales by auction, lest, under this idea of introducing evidence of mistake, the rule should be relaxed by letting it in to explain, alter, contradict, and, in effect, get rid of, a written agreement: per Sir T. Plumer, V.-C., *Clowes* v. *Higginson*, 1 Ves. & B. 524, 527.

Time and title are exceptions to the rule.

There are two subjects connected with sales of land, viz., Time and Title, which are exceptions to the rule as to subsequent parol variations. It is well established that in Courts of equity, unless time is of the essence, the dates fixed by the contract are never regarded as rigidly binding; and the conduct of the parties is also frequently taken into account in this non-essential variation of the original agreement: *Seton* v. *Slade*, 7 Ves. 265; *Hearne* v. *Tenant*, 13 Ves. 287; see Ch. XX. The title becomes the subject of investigation, and often of negotiation, after the contract has been signed; and after discovery of defects therein the purchaser may be held to have waived by his conduct the right to insist on them.

Express contract as to title.

Where the contract expressly provided that the vendor should adduce a good title, it was held that he could not set up a parol waiver of that stipulation and recover the purchase-money in an action of assumpsit: *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; see also *Cato* v. *Thompson*, 9 Q. B. D. 616.

Sect. 3.—*Procedure in Cases of Mistake.*

Agreement claimed must be proved.

If the agreement as proved differs from that pleaded by the plaintiff, he cannot obtain relief: *Mortimer* v. *Orchard*, 2 Ves. jun. 243; *Mundy* v. *Jolliffe*, 9 Sim. 413.

Plaintiff cannot adopt defendant's statement.

He is not allowed, against the wish of the defendant, to resort to the agreement set up by the latter: *Legal* v. *Miller*, 2 Ves. sen. 299; *Legh* v. *Haverfield*, 5 Ves. 452.

Election.

And the plaintiff must in such a case either take a specific performance of the contract according to the defendant's contention, or have his action dismissed: *Ramsbottom* v. *Gosden*, 1 Ves. & B. 165.

On plaintiff's submission specific performance at request of defendant.

Where the plaintiff submits in his statement of claim to perform the agreement, the Court, being satisfied by the parol evidence of the defendant of the true terms, will, at his request, and without a counter-claim, decree specific performance of the agreement together with the parol variation: *Fife* v. *Clayton*, 13 Ves. 546.

Construction of contract.

Again, if the plaintiff insists on a particular construction of the agreement, specific performance may be decreed, according to the defendant's construction: *Stapylton* v. *Scott*, 13 Ves. 425. See, however, *Preston* v. *Luck*, 27 Ch. D. 497, 507.

Procedure when parol variation set up by defendant.

It is quite competent for the defendant to set up a variation from the written contract, and it will depend on the particular circumstances in each case whether the variation set up by the defendant is to defeat the plaintiff's title to have a specific performance, or whether the Court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for: per Lord Cottenham, L. C., *London and Birmingham Ry. Co.* v. *Winter*, Cr. & Ph. 57, 62. See also *Lindsay* v. *Lynch*, 2 Sch. & L. 1; *Jeffrey* v. *Stephens*, 6 Jur. N. S. 947; *Smith* v. *Wheatcroft*, 9 Ch. D. 223; where the defendant was ordered to pay the costs of the action, because he did not disclose what were the true terms of the agreement, which was a document in his possession.

Written agreement in general binding.

Where persons sign a written agreement upon a subject, obnoxious or not obnoxious to the Statute of Frauds, and there

Chap. XXVII. s. 3.

has been no circumvention, fraud, or mistake, the written agreement binds both at law and in equity, according to its terms, although verbally a provision was agreed to, which has not been inserted in the document; subject to this, that either of the parties, sued in equity upon it, may perhaps be entitled, in general, to ask the Court to be neutral, unless the plaintiff will consent to the performance of the omitted term: per Knight-Bruce, L. J., *Martin* v. *Pycroft*, 2 De G. M. & G. 785, 795.

Sect. 4.—*Rectification.*

It was remarked by Lord Nottingham in an early case that "the Chancery mends no man's bargain, though it sometimes mends his assurance:" *Maynard* v. *Moseley*, 3 Swanst. 653, 655; and to the same effect are the following observations of Lord Justice (then V.-C.) James:—

Instruments, not contracts, rectified.

Courts of equity do not rectify *contracts;* they may and do rectify *instruments* purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument: *Mackenzie* v. *Coulson*, L. R. 8 Eq. 368, 375.

Writing in general conclusive.

By the settled rules of law, when parties reduce their contract into writing, evidence of a verbal agreement differing from that which is expressed in writing cannot be admitted, except for the purpose of defence, in an action for specific performance.

No rectification of written agreement.

There can, therefore, be no rectification of a written agreement for the sale of land; for that would be equivalent to granting specific performance with a parol variation: *Att.-Gen.* v. *Sitwell*, 1 Y. & C. Ex. 559; *Price* v. *Ley*, 4 Giff. 235.

Latent ambiguity may be explained.

If there is a latent ambiguity in the agreement parol evidence may be received to explain it; and specific performance may be decreed of the agreement so explained: *McMurray* v. *Spicer*, L. R. 5 Eq. 527. See *Re Boulter*, 4 Ch. D. 241. And if a

deed has been executed erroneously interpreting the ambiguity in the executory agreement, it may be rectified on parol evidence: *Murray* v. *Parker*, 19 Beav. 305.

Deed cannot be rectified if it carries out the written agreement.

As an executory agreement cannot be rectified on parol evidence of an omission, so, *à fortiori*, when the executory agreement has been carried out by a deed, the latter cannot be rectified: *Davies* v. *Fitton*, 2 Dru. & War. 225; where Lord St. Leonards said that it was against first principles to discuss it. "It is said," observed the learned Judge, "that this is not the case of a party seeking the execution of a contract; no, but it is the case of a party seeking to have an executed contract reformed by means of that very parol evidence, which, in the former case, I must have rejected. If the plaintiffs had come here to have the contract executed, I must have given them the precise lease which actually exists. Can I now, then, reform this lease by that evidence, which, if the lease rested *in fieri*, would be inadmissible to aid in carrying it into execution? It would be more violent, I think, now to reform this lease by that evidence, than formerly to use it for the purpose of executing the contract. It is said, that if a mistake was proved, and that there was no written contract, the parol evidence would be admissible. Perhaps it might, because there is no settled rule of law in the way, and, as there is no written contract, the Court must endeavour to ascertain, by the best evidence it can get, what was the contract of the parties, and whether there was any mistake:" pp. 232, 233.

Why a deed not preceded by a written agreement may be rectified.

The somewhat startling suggestion that a deed, when not preceded by a written agreement, may be rectified by parol evidence, but that a written agreement cannot be so rectified, may be explained in the following manner:—

The deed generally recites that there was an antecedent agreement, and evidence may be admitted to show what agreement is referred to. If, therefore, it is found that the deed does not carry out the antecedent agreement, although merely parol, there is jurisdiction to reform it. The case is entirely different when it is sought to rectify by parol evidence an executory agreement in writing. For that is simply setting up verbal against written evidence of the same transaction.

Chap. XXVII. s. 4.

Before signing an agreement in writing, the parties have presumably agreed to the terms by parol (*Rann* v. *Hughes*, 7 T. R. 351), but the two agreements are necessarily identical; for the reduction of the terms into writing merges, so to speak, the previous parol agreement.

The deed and the executory agreement, which precedes it, have different objects and purposes to fulfil, whereas the written agreement purports to be only a more permanent form of the same contract, previously entered into by the parties.

Power of the Court to rectify written instruments.

The jurisdiction to rectify mistakes has been asserted in the most general terms by Lord Romilly, M. R., in the following passage:—"In matters of mistake the Court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised in all cases where a deed, as executed, is not according to the real agreement between the parties. In all cases, the real agreement must be established by evidence, whether parol or written; if there be no previous agreement in writing, parol evidence is admissible to show what the agreement really was; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to explain it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument:" *Murray* v. *Parker*, 19 Beav. 305, 308.

Conveyance rectified where too much or too little is conveyed.

The conveyance may be rectified so as to be in conformity with the agreement, either by enlarging the subject of the conveyance, where something has been omitted, or by deducting the excess, where more has been conveyed than was intended: *Beaumont* v. *Bramley*, T. & R. 41, 52; where Lord Eldon, after referring to these two cases of rectification, said: "But then it must be remembered that if the former is a case of great difficulty, the latter is also a case of great difficulty, and the Court must in each case proceed with the greatest possible caution. There is no doubt, on the one hand, that if an instrument affects by its recital to carry into execution a certain agreement, and goes beyond that agreement, the Court will rectify it, because then it has clear evidence, on the face of the instrument itself, that the instrument operates beyond its intended operation; on the

other hand, it is quite clear that parties may enter into articles of agreement, and the terms of the agreement may be extended by parol, provided the conveyance itself is written evidence that there has been such an extension of the parol agreement. If there is nothing but parol agreement additional to the written agreement, the proof of that parol agreement may perhaps be a ground in this Court for refusing to execute the written agreement; but the case is quite different where the conveyance recites what is the agreement which the parties intend to carry into effect." See *Young* v. *Halahan*, Ir. R. 9 Eq. 70.

Summary.

The law on the subject of the rectification of the conveyance may be shortly stated in the following terms:—

The deed will be rectified when it does not conform to (1) an agreement recited in the deed itself; (2) an agreement in writing which the plaintiff might have specifically enforced; or (3) *semble*, a verbal agreement where there is no agreement in writing. But it will not be rectified so as to conform to a verbal agreement differing from the agreement in writing, the latter being carried out by the deed.

Evidence.

In all cases of rectification, the evidence must be of the most conclusive nature, see *ante*, p. 427; *Henkle* v. *Royal Exchange Assurance Co.*, 1 Ves. sen. 317; and after the lapse of time, and against the oath of the defendant, the Court is very slow compulsorily to alter a deed: *Bloomer* v. *Spittle*, L. R. 13 Eq. 427; *Mayor of New Windsor* v. *Stovell*, 27 Ch. D. 665.

There is no objection to correct a deed by parol evidence, when you have anything in writing beyond the parol evidence to go by; but where there is nothing but the recollection of witnesses, and the defendant denies the case set up by the plaintiff, the plaintiff appears to be without a remedy: per Sir E. Sugden, *Mortimer* v. *Shortall*, 2 Dru. & War. 363, 374; and see *Alexander* v. *Crosbie*, Ll. & G. t. Sugd. 145.

The evidence must show not only that there was a mistake, but must also establish what was intended to be done: *Bentley* v. *Mackay*, 4 De G. F. & J. 279, 286.

Mistake must be mutual.

In order to obtain rectification the mistake must be common to both parties: *Sells* v. *Sells*, 1 Dr. & Sm. 42; *Bradford* v.

Romney, 30 Beav. 431; *Garrard* v. *Frankel*, 30 Beav. 445; *Mayor of New Windsor* v. *Stovell*, 27 Ch. D. 665.

A mistake on one side may be a ground for rescinding, but not for correcting, a contract: *Mortimer* v. *Shortall*, 2 Dru. & War. 363.

But if the rectification sought is really a partial rescission, for example, to set aside a deed as against some parties, the rule as to mutuality does not apply: *Bentley* v. *Mackay*, 4 De G. F. & J. 279.

Lord Romilly, M. R., seems to have considered, that when it is possible to restore the parties to the same position as they occupied before the conveyance, the Court can interfere in cases of one-sided mistake: *Harris* v. *Pepperell*, L. R. 5 Eq. 1. Accordingly, where there was a clearly proved mistake of the vendor as to the parcels in a conveyance, he gave the defendant, the purchaser, the option of having the contract annulled, or else of taking it in the form which the plaintiff intended. See also *Garrard* v. *Frankel*, 30 Beav. 445; *Paget* v. *Marshall*, 28 Ch. D. 255.

No rectification when terms not concluded.

Where it was agreed that a life annuity, calculated on the basis of the government tables, should be substituted for the purchase-money of an estate, and the agent of the annuitant undertook to ascertain the amount of the government annuity, but being misinformed stated it at too high a figure, it was held that the deed granting the annuity could not be reformed, because it was not apparent that the annuitant would have accepted less than the amount actually granted, but that (even after the lapse of four years) the grantor was entitled to have the deed set aside: *Carpmael* v. *Powis*, 10 Beav. 36.

Reconveyance.

The question has been often raised whether, after a declaratory order of the Court has been made rectifying a deed, a conveyance is necessary to carry it into effect. As to mere equities it is clear that they are effectually bound by the order, and that no conveyance is necessary. In the case, however, of a legal estate in land, the modern tendency seems to be to dispense with a conveyance; but the practice cannot be said to be definitively settled.

In an early case after judgment in ejectment the plaintiff at

law was ordered by the Court of Chancery to re-grant a farm which had by mistake been included in his conveyance: *Tyler* v. *Beversham*, Rep. t. Finch, 80.

And where by mistake part of one lot was included in the conveyance of another, it was held that the disputed parcel should be conveyed by one purchaser to the other; and that the vendor should not have been made a party to the action: *Leuty* v. *Hillas*, 2 De G. & J. 110.

Different opinions on the subject.

Lord Cottenham, in a case where an estate had passed under general words contrary to the intention of the parties, made a declaratory decree, and directed a reconveyance of the estate: *Marquess of Exeter* v. *Marchioness of Exeter*, 3 My. & Cr. 321, 326.

In several cases, however, Lord Romilly, M. R., expressed an opinion that a reconveyance was not necessary: *Hoghton* v. *Hoghton*, 15 Beav. 278, 321; *Att.-Gen.* v. *Magdalen Coll.*, 18 Beav. 223, 255; *Earl of Malmesbury* v. *Countess of Malmesbury*, 31 Beav. 407.

And the same view is held by Sir J. Bacon, V.-C.: *White* v. *White*, L. R. 15 Eq. 247; *Hanley* v. *Pearson*, 13 Ch. D. 545.

In the last-mentioned case the judgment directed that certain words should be omitted, and others inserted, and that a copy of the order should be endorsed on the settlement.

Vested estate not divested by cancellation of deed.

This procedure may be convenient, but "there is no doubt that, if an estate vest in a person by deed, the cancelling of the deed, though it may create a difficulty of proving the title, yet cannot divest the estate." Per Lawrence, J., *Moss* v. *Mills*, 6 East, 144, 148. See also *Leech* v. *Leech*, 2 Rep. Ch. 100; *Bolton* v. *Bishop of Carlisle*, 2 H. Bl. 259; *Roe* d. *Berkeley* v. *Archbishop of York*, 6 East, 86; *Cox* v. *Bruton*, 5 W. R. 544; *Clark* v. *Malpas*, 4 De G. F. & J. 401.

It is, therefore, submitted that when a deed is rectified on the ground of mistake, and a legal estate has to be dealt with, a conveyance should in all cases be executed. If part of the property has been omitted from the conveyance it seems clear that a mere order for rectification will not have the effect of passing the estate from the vendor to the purchaser; and there

Chap. XXVII. s. 4.

is no difference in principle between such a case and that in which more has been conveyed than was intended.

Rectification of settlements.

A settlement executed after marriage will be controlled by the articles: *Legg* v. *Goldwire*, Cas. t. Talb. 20; *Cogan* v. *Duffield*, L. R. 20 Eq. 789; 2 Ch. D. 44. And if the settlement and articles both precede the marriage the former will be made to conform to the articles without any further evidence, if it expressly recites that it is made in pursuance of them: *Honor* v. *Honor*, 1 P. Wms. 123; *West* v. *Errissey*, 2 P. Wms. 349. If there is no reference to the articles in the settlement, the settlement is, in general, treated as the final arrangement: *Legg* v. *Goldwire*, *supra;* but parol evidence is admissible to show that the variation was introduced by mistake: *Bold* v. *Hutchinson*, 5 De G. M. & G. 558.

Settlement without articles.

If there are no articles, the settlement may nevertheless be rectified on parol evidence, but the jurisdiction is to be cautiously exercised: *Barrow* v. *Barrow*, 18 Beav. 529; 5 De G. M. & G. 782. See also *Lackersteen* v. *Lackersteen*, 30 L. J. Ch. 5; *Bradford* v. *Romney*, 30 Beav. 431.

Evidence of one party.

The limitations will be modified on the uncontradicted evidence of the wife that they were inserted by mistake: *Smith* v. *Iliffe*, L. R. 20 Eq. 666; *Clark* v. *Girdwood*, 7 Ch. D. 9; *Hanley* v. *Pearson*, 13 Ch. D. 545; *Lovesy* v. *Smith*, 15 Ch. D. 655.

Very slight evidence is sufficient, where an inspection of the deed alone leads to a presumption of a mistake: *Re De La Touche's Settlement*, L. R. 10 Eq. 599.

In order to enable the Court to rectify a settlement it must be proved that some provision has been inserted by mistake contrary to the intention of all the parties: *Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Sells* v. *Sells*, 1 Dr. & Sm. 42; *Bradford* v. *Romney*, 30 Beav. 431.

Difference between settlements and conveyances.

There is one broad distinction between marriage settlements and conveyances which must be noticed with reference to the subject of rectification. In the case of settlements, the marriage having taken place on the faith of the settlement, no *restitutio in integrum* is possible. Rescission is, therefore, out of the question. The deed must stand either as it is, or as it was intended to be. But in conveyances the parties may, in general, be

restored to their original positions, by the rescission of the contract upon equitable terms. Settlements are accordingly reformed, on evidence which would fail to establish the case of the plaintiff for the rectification of a conveyance.

Sect. 5.—*Mistakes of Fact and Mistakes of Law.*

Mistakes in subject-matter.

The mistakes which most commonly arise on sales of land relate to the subject-matter of the contract, and these are mistakes of fact; but there may also be mistakes of law, as, for example, an erroneous inference from the documents of title, or a false construction of the agreement itself.

Ignorantia juris haud excusat.

The maxim, *Ignorantia juris haud excusat*, must be read with important qualifications if it is to be applied to mistakes in a contract; for it may be regarded as now settled that the Court has power to relieve against mistakes in law as well as against mistakes of fact; per Turner, L. J., *Stone* v. *Godfrey*, 5 De G. M. & G. 76, 90.

And, in a case before the House of Lords, where, on a mistaken interpretation of a private Act of Parliament, a man had entered into an agreement to take a lease of what was in truth his own property, Lord Westbury, referring to the maxim, "*Ignorantia juris haud excusat*," said, "But in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law, but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand:" *Cooper* v. *Phibbs*, L. R. 2 H. L. 149, 170.

Chap. XXVII. s. 5.

Ownership a mixed question of law and fact.

Private right of ownership is in almost every case a mixed question of law and fact. See *Eaglesfield* v. *Londonderry*, 4 Ch. D. 693, at p. 702.

Construction of deed.

Although when a certain construction has been put by a Court of law upon a deed, it must be taken that the legal construction was clear, yet the ignorance before the decision of what was the true construction, cannot deprive a person of his right to relief on the ground that he was bound himself to have known beforehand how the grant must be construed: per Lord Chelmsford, *Beauchamp* v. *Winn*, L. R. 6 H. L. 223, 234.

Mistake as to the construction of a contract is matter of law, and where the true construction has been declared by a competent Court, subsequent dealings inconsistent with that construction confer no title upon either party to equitable relief: *Midland Ry. Co of Ireland* v. *Johnson*, 6 H. L. C. 798. See also *Denys* v. *Shuckburgh*, 4 Y. & C. Ex. 42.

Marriage and divorce.

Marriage and divorce are mixed questions of law and fact; and when a person renounces his claim to property under a mistake respecting the validity of a marriage, or the efficacy of a divorce, he will not be held bound by such renunciation: *M'Carthy* v. *Decaix*, 2 Russ. & M. 614. In this case Lord Brougham said, "What he has done was done in ignorance of law, possibly of fact; but in a case of this kind that would be one and the same thing:" at p. 621.

Legal effect of the agreement.

A mistake as to the legal effect of the agreement is not a valid defence to an action for specific performance: *Powell* v. *Smith*, L. R. 14 Eq. 85.

Bonâ fide purchaser for value.

The mistake of the vendors as to their rights *inter se* will not be allowed to prejudice a fair purchaser: *Malden* v. *Menill*, 2 Atk. 8.

When contracting parties act without fraud on a *bonâ fide* apprehension of their interests, the subsequent discovery that they were mistaken as to these interests will not be sufficient ground to set aside a purchase for valuable consideration: *Marshall* v. *Collett*, 1 Y. & C. Ex. 232; *Sturge* v. *Starr*, 2 Myl. & K. 195.

Money paid under mistake of fact.

Money paid under a mistake of fact, common to both parties, may be recovered; even when by the lapse of time the payee is

precluded from obtaining payment from the persons who were originally liable: *Durrant* v. *Ecclesiastical Commissioners*, 6 Q. B. D. 234.

Money paid under a mistake of law.

Although the old rule that equitable relief in cases of mistake was confined to mistakes of fact, has been materially modified by the modern cases, it is still the "rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and, as a general rule, the Courts of Equity did not in such cases interfere with the Courts of Law." Per Mellish, L. J., *Rogers* v. *Ingham*, 3 Ch. D. 351, 357; *Re Young and Harston*, 33 W. R. 516. 29 Ch.D. 691. But see W.N. 1885 p. 195. 31 Ch.D. 168.

In order that relief may be granted against a mistake of law there must be some equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it: *Ibid.*

Lord Justice James in the same case points out that "the law on the subject was the same in the old Court of Chancery as in the old Courts of common law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded upon equitable considerations." Compare *Brisbane* v. *Dacres*, 5 Taunt. 143.

Purchase-money when title bad.

It is clearly settled that the purchaser cannot, on the title proving bad, recover his purchase-money as money had and received to his use. No fraud having been practised, the maxim *Caveat emptor* applies, and, except under the covenants for title, the purchaser who has been evicted after conveyance is without remedy: *Bree* v. *Holbech*, Dougl. 655; *Cripps* v. *Reade*, 6 T. R. 606; *Clare* v. *Lamb*, L. R. 10 C. P. 334.

Statute of Limitations.

The Statute of Limitations runs only from the discovery of the mistake: *Brooksbank* v. *Smith*, 2 Y. & C. Ex. 58; *Ecclesiastical Commissioners* v. *N. E. Ry. Co.*, 4 Ch. D. 845; *Trotter* v. *Maclean*, 13 Ch. D. 574.

CHAPTER XXVIII.

SPECIFIC PERFORMANCE.

SECT.		PAGE
1.	*Jurisdiction*	440
2.	*The plaintiff's case*	444
	i. *Parties*	444
	ii. *Pleading*	450
3.	*The defendant's case*	452
	i. *Statement of defence*	452
	ii. *Defences on legal grounds*	454
	(a) *No contract*	454
	(b) *Personal incapacity*	454
	(c) *Illegality*	456
	(d) *Statute of Frauds*	456
	(e) *Contract rescinded*	456
	(f) *Plaintiff's breach of contract*	456
	iii. *Defences on equitable grounds*	457
	(a) *Unfairness*	457
	(b) *Hardship*	458
	(c) *Contract not capable of being executed*	460
	(d) *Plaintiff's laches*	461
4.	*Counter-claim and reply*	464
5.	*Proceedings in the action before trial*	466
	i. *Account*	466
	ii. *Decision of point of law*	466
	iii. *Judgment on admissions*	466
	iv. *Payment into court*	467
	v. *Injunctions*	470
6.	*Judgment and consequent directions*	471
	i. *Form of the judgment*	471
	ii. *Reference of title*	472
	iii. *Doubtful titles*	473
	(a) *General law*	473
	(b) *Particular instruments*	476
	(c) *Facts*	476
	iv. *Time when a good title shewn*	477
7.	*Damages*	478
8.	*Costs*	481
9.	*Summons under the Vendor and Purchaser Act*	485

SECT. 1.—*Jurisdiction.*

Proposed treatment.

FREQUENT reference has been made in the foregoing pages to the subject of specific performance, as the touchstone by which the rights of vendor and purchaser are invariably tried. It is, however, necessary to bring together into a single chapter such portions of this extensive branch of the law as will enable the reader to follow the course of an action. In the proposed treatment of the subject, attention will be chiefly directed to practice, rather than to the rights of the parties; the latter, in order to

avoid repetition, being for the most part treated by reference to earlier parts of the work.

Jurisdiction discretionary.

The exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court—not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles: per Lord Chelmsford, *Lamare* v. *Dixon*, L. R. 6 H. L. 414, 423. See also *Goring* v. *Nash*, 3 Atk. 186; *White* v. *Damon*, 7 Ves. 30; *Hall* v. *Warren*, 9 Ves. 605; *Haywood* v. *Cope*, 25 Beav. 140.

Land as the subject of contract.

So far as the subject-matter of the contract is concerned, agreements for the sale and purchase of land will always be specifically enforced: *Buxton* v. *Lister*, 3 Atk. 383; on the ground that damages in such cases do not give the party the compensation to which he is entitled: *Harnett* v. *Yeilding*, 2 Sch. & L. 549.

Leases.

And in like manner agreements for leases will be specifically enforced, but not agreements for a tenancy from year to year: *Clayton* v. *Illingworth*, 10 Hare, 451.

Incidental works decreed;

The Court occasionally, in cases relating to land, decrees the execution of incidental works, which it would not decree if they had been the subject of a separate contract. Thus, where the vendor of a piece of land agreed to make a road of which the purchaser was to have the use, and the purchaser agreed to spend a sum of 3,000*l.* at least in building a house on the premises, it was held that these stipulations would not prevent specific performance: *Wells* v. *Maxwell*, 32 Beav. 408.

Not of an agreement to build.

As between the owner and the builder, specific performance has never been decreed of an agreement to build a house; for "if A. will not do it, B. may:" *Errington* v. *Aynesly*, 2 Bro. C. C. 341. But, as between lessor and lessee, there was much conflict of judicial opinion in the earlier cases. Thus, Lord Hardwicke is reported to have said, "Upon a covenant to build, the plaintiffs are clearly entitled to come into this Court for a specific performance; otherwise on a covenant to repair:" *City of London* v. *Nash*, 3 Atk. 512, 515. To the same effect are *Allen* v. *Harding*, 2 Eq. Ca. Abr. 17; *Mosely* v. *Virgin*, 3 Ves. 184; *Pembroke* v. *Thorpe*, 3 Sw. 437, n.; but the contrary is

expressly laid down by Lord Thurlow, on the principle that "he could no more undertake the conduct of a rebuilding than of a repair:" *Lucas* v. *Commerford*, 3 Bro. C. C. 166.

It is now clearly settled that the Court will not specifically enforce a contract to build a house: *Brace* v. *Wehnert*, 25 Beav. 348, 351; *Wilkinson* v. *Clements*, L. R. 8 Ch. 96.

Agreement enforced, although it includes building.

An agreement for a lease, however, may be specifically enforced, although it contains stipulations as to repairs: *Paxton* v. *Newton*, 2 Sm. & G. 437; and the construction of works by a railway company may be enforced, although the agreement provides for their being kept in repair: *Lytton* v. *G. N. Ry. Co.*, 2 K. & J. 394; and where an agreement for a lease contains stipulations for the execution of certain works, specific performance may be ordered as to the lease, and damages given for the non-execution of the works: *Kay* v. *Johnson*, 2 H. & M. 118; *Middleton* v. *Greenwood*, 2 De G. J. & S. 142. A building agreement, moreover, may be divisible, so that the assignee of the builder may call for a lease of one plot of ground on which the houses have been finished, without assuming the responsibilities of the builder in respect of the unfinished works: *Wilkinson* v. *Clements*, L. R. 8 Ch. 96.

Divisible contracts.

Contract to execute defined buildings.

Although the established rule is, that specific performance will not be decreed of an agreement to build, yet Lord Rosslyn, L. C., stated that the rule "certainly admits this qualification—if the transaction and agreement is in its nature defined, perhaps there would not be much difficulty to decree specific performance:" *Mosely* v. *Virgin*, 3 Ves. 184, 185. Lord Justice Fry, after referring to this *dictum*, in terms of hesitating approval, adds:—"But whether the Court will, or will not, interfere to enforce all such contracts when definite, it appears to be settled that it will assume jurisdiction when we have the following three circumstances. First, that the work to be done is defined; secondly, that the plaintiff has a material interest in its execution, which cannot adequately be compensated for by damages; and, thirdly, that the defendants have by the contract obtained from the plaintiff possession of the land on which the work is to be done:" Fry on Specific Performance, p. 38.

Against railway company.

Where a railway company acquires land under an agreement

which provides for the construction of accommodation works, the Court frequently orders the company to construct the works in specie: *Storer* v. *G. W. Ry. Co.*, 2 Y. & C. C. 48; *Sanderson* v. *Cockermouth Ry. Co.*, 11 Beav. 497; affirm. L. C. 2 Hall & T. 327; *Wilson* v. *Furness Ry. Co.*, L. R. 9 Eq. 28; *Greene* v. *West Cheshire Ry. Co.*, L. R. 13 Eq. 44.

Construction of station.

As to agreements for the construction of a station, see *Hood* v. *N. E. Ry. Co.*, L. R. 5 Ch. 525; *Wilson* v. *Northampton and Banbury Ry. Co.*, L. R. 9 Ch. 279.

Damages in lieu of specific performance.

Where the legal remedy by way of damages gives adequate relief, the Court will not grant specific performance, which, according to Lord Kenyon, "is only decreed when the party wants the thing in specie, and cannot have it any other way:" *Errington* v. *Aynsly*, 2 Bro. C. C. 341. Thus, when there was a covenant to "make good a gravel pit" at the end of the term, the lessor was left to his remedy at law: *Flint* v. *Brandon*, 8 Ves. 159. On the same ground, specific performance was refused of an agreement to work a quarry: *Booth* v. *Pollard*, 4 Y. & C. Ex. 61.

Not decreed when supervision necessary.

Specific performance will not be decreed if it would be impossible, or highly inconvenient, for the Court to see that its order was obeyed. On this ground it refuses to "undertake either the construction of a railway, the management of a brewery, or the management of a colliery, or anything of the kind. It will appoint a receiver or manager in certain cases, but for this Court to undertake the working of a colliery, for this Court to superintend workings of this description, is entirely out of the question:" per Malins, V.-C., *Wheatley* v. *Westminster Brymbo Coal Co.*, L. R. 9 Eq. 538, 552.

Sect. 2.—*The Plaintiff's Case.*

Assuming that a binding and enforceable contract has been entered into, which one party neglects or refuses to carry out, and that an action for specific performance is about to be instituted, the first thing to be ascertained is the persons who should be named as plaintiff and defendant respectively.

Parties to the contract should be the parties to the suit.

The general rule as to parties in suits for specific performance is that the parties to the contract, or their representatives, are the necessary and sufficient parties to the suit: *Humphreys* v. *Hollis*, Jac. 73, 75; *Petre* v. *Duncombe*, 7 Hare, 24, 28; Fry on Sp. Perf. 62, 73; Daniell, Ch. Pr. 227.

Persons interested in the estate.

Accordingly, persons who claim an interest in the estate, but who were not parties to the contract, should not be made defendants: *Mole* v. *Smith*, Jac. 490; *Robertson* v. *G. W. Rail. Co.*, 10 Sim. 314; or co-plaintiffs: *Wood* v. *White*, 4 My. & Cr. 460, 483.

Mortgagees.

Mortgagees are not proper parties, whether the contract is for the sale of the equity of redemption or of the property free from incumbrances: *Tasker* v. *Small*, 3 My. & Cr. 63; *Hall* v. *Laver*, 3 Y. & C. Ex. 191.

So mortgagees with notice of a prior contract to grant a lease are not proper parties to an action for specific performance of the contract: *Long* v. *Bowring*, 33 Beav. 585.

Parties to the conveyance.

Although persons may be necessary parties to the conveyance, they should not be made parties to the action, unless they entered into the contract: *Paterson* v. *Long*, 5 Beav. 186; *Halifax Joint Stock Banking Co.* v. *Sowerby Bridge Town Hall Co.*, W. N. (1881), 65.

Persons in possession of the deeds.

Persons who are in possession of the title deeds should not on that account be made parties to an action against the vendor: *M'Namara* v. *Williams*, 6 Ves. 143; *Fenwick* v. *Reed*, 1 Mer. 114; *Muston* v. *Bradshaw*, 15 Sim. 192.

Adverse claimants.

A mere stranger, claiming under an adverse title, cannot be made a party to a suit for specific performance: *De Hoghton* v. *Money*, L. R. 2 Ch. 164, 170. But a person who has contracted for a lease of mines may bring in, as a third party, under Ord. XVI. r. 48, the claimant who disputes the lessor's title.

No counter-claim, however, can be delivered by the third party: *Eden* v. *Weardale Iron and Coal Co.*, 28 Ch. D. 333.

A stranger who claims not by a paramount title, but under the contract, may be made a party. A person, for example, who claims an interest in the purchase-money thereby adopts the contract, and may be joined as a defendant: *West Midland Rail. Co.* v. *Nixon*, 1 H. & M. 176.

Inconsistent contracts.

When the vendor enters into two successive contracts for the sale of the same property to different persons, the second purchaser may be made a defendant to an action for specific performance by the first, if he insists on the benefit of his contract: *Spence* v. *Hogg*, 1 Coll. 225; *Shaw* v. *Thackray*, 1 Sm. & G. 537; see, however, *Cutts* v. *Thodey*, 13 Sim. 206. And if the second purchaser has, after notice of the first contract, obtained a conveyance of the legal estate, the Court will, in an action for specific performance by the first purchaser, compel him to convey the estate to the plaintiff: *Potter* v. *Sanders*, 6 Hare, 1.

And it would seem that the second purchaser might, in like manner, make the first purchaser a defendant to his suit for specific performance against the vendor, alleging the invalidity of the first agreement.

Again, if the vendor of leaseholds surrenders the lease and accepts a new one, containing a covenant against assignment without licence of the lessor, the lessor may be made a defendant if a case of acquiescence can be made out: *Willmott* v. *Barber*, 15 Ch. D. 96.

Sub-purchaser.

It seems that the vendor cannot enforce specific performance directly against a sub-purchaser (*Chadwick* v. *Maden*, 9 Hare, 188; see *Fenwick* v. *Bulman*, L. R. 9 Eq. 165), unless he has been substituted for the original purchaser, and accepted as such by the vendor (*Holden* v. *Hayn*, 1 Mer. 47); in which event the original purchaser should not be a party: *Hall* v. *Laver*, 3 Y. & C. Ex. 191.

The purchaser and the sub-purchaser may join as co-plaintiffs: *Nelthorpe* v. *Holgate*, 1 Coll. 203.

Voluntary settlements.

An exception to the general rule, that the rights of third parties are not to be involved in actions for the specific per-

formance of contracts, is furnished by the cases of voluntary settlements. For it is clearly established that a purchaser who finds a settlement in his way is entitled to have the question tried whether it is voluntary or not. "That is a question which cannot be tried between the vendor and the persons interested under the settlement, for the settlement is binding upon the vendor. It is a question which can be tried only by the purchaser, and if to be tried with him, I see no reason why it should not be tried in a suit for specific performance, rather than be made the subject of a distinct and separate suit, the more so, as it is a question which affects the validity no less than the performance of the contract:" per Turner, L. J., *Townend* v. *Toker*, L. R. 1 Ch. 446, 457; and see *Holford* v. *Holford*, 1 Ch. Ca. 216; *Buckle* v. *Mitchell*, 18 Ves. 100.

Lease by mortgagor or mortgagee.

In the interests of lessees and purchasers, the legislature has, in several instances, conferred on persons having qualified or limited interests powers of making contracts binding upon the land. Thus, by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 18, a mortgagor or mortgagee, while in possession, has certain powers of granting leases, and the section provides that, "a contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding."

This evidently introduces an exception to the general rule as to parties in actions for specific performance; for the mortgagee's contract may be enforced against the mortgagor after redemption or recovery of possession; and in like manner the mortgagee who has entered into possession, after the mortgagor has made a valid contract for a lease, may be sued for specific performance of the contract.

Contracts by limited owners.

Again, the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31, empowers the tenant for life and other limited owners (see sect. 58) to contract for the sale, exchange, partition, mortgage, or charge of the settled land; and further provides that "every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life [*or other limited owner*], and may be carried into effect by any

such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself."

Under this section the benefit and the burthen of the contract are handed on from the limited owner to his successor, who may accordingly be either plaintiff or defendant in an action on a contract to which he was no party.

Contracts under powers.

The same state of circumstances arises when a contract is made by the donee of a power who dies before completion. It is settled that the contract is enforceable by or against the remainderman if the contract was made pursuant to the power: *Shannon* v. *Bradstreet*, 1 Sch. & L. 52; but if the contract is not within the power of the limited owner, the remainderman, though able and willing to carry it out, cannot enforce specific performance: *Ricketts* v. *Bell*, 1 De G. & S. 335; and see *Long* v. *Crossley*, 13 Ch. D. 388; *Davis* v. *Harford*, 22 Ch. D. 128.

Contracts by agents.

When a contract is entered into by an agent, the principal may sue or be sued without bringing the agent before the Court: Dan. Ch. Pr. 204; see *Commins* v. *Scott*, L. R. 20 Eq. 11, 16. But the agency, if it does not appear on the face of the contract, must be proved *aliunde*. If the plaintiff cannot prove the agency of the person who signed the agreement, he must be made a party; and in that event alternative relief may be claimed against the alleged principal and agent: *Honduras Inter-Oceanic Rail. Co.* v. *Lefevre*, 2 Ex. D. 301; *Child* v. *Stenning*, 5 Ch. D. 695; 7 Ch. D. 413. See also R. S. C. 1883, Ord. XVI. r. 7.

The general rule, however, is that an agent should not be made a party to an action for specific performance: Dan. Ch. Pr. 205.

Auctioneer.

An auctioneer, holding the deposit for the party ultimately entitled, may be made a defendant. But the established practice is not to make him a party unless—(1) he has refused to pay the deposit into Court; or (2) the deposit is of large amount and is retained by him: *Earl of Egmont* v. *Smith*, 6 Ch. D. 469; or (3) he has threatened to pay over the deposit to the other party: *Cutts* v. *Thodey*, 13 Sim. 206.

Ch. XXVIII. s. 2.

Solicitor.

The solicitor of the vendor who has received the deposit as a stakeholder, and improperly parted with it, may be made a defendant: *Wiggins* v. *Lord*, 4 Beav. 30.

The Court discourages the practice of making solicitors or others, who are properly witnesses, parties to suits, with the object of charging them with costs: *Barnes* v. *Addy*, L. R. 9 Ch. 244; *Burstall* v. *Beyfus*, 26 Ch. D. 35. A solicitor need not be made a party because he has the title deeds in his possession: *Fenwick* v. *Reed*, 1 Mer. 114; but if he has mixed himself up with the fraud of his client he may be made a party: *Bowles* v. *Stewart*, 1 Sch. & L. 209; *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394; see *Baker* v. *Loader*, L. R. 16 Eq. 49.

Assignees of the contract.

Another group of exceptions to the general rule as to parties presents itself in cases where there has been an assignment of the contract or the property. The assignee of a contract which does not require any skill or discretion for its performance may sue the other party to the contract, unless an intention to the contrary can be collected from the agreement. Thus, specific performance of an agreement for a lease may be enforced in favour of the assigns of the intended lessee: *Crosbie* v. *Tooke*, 1 Myl. & K. 431; *Morgan* v. *Rhodes*, *ibid.* 435; *Buckland* v. *Papillon*, L. R. 2 Ch. 67; unless it was part of the agreement that the lease when granted should not be assigned without the licence of the lessor: *Weatherall* v. *Geering*, 12 Ves. 504; and see *Dowell* v. *Dew*, 1 Y. & C. C. 345.

So an agreement for the sale of an estate may be assigned or charged, and, upon notice, the vendor becomes bound to convey to the assignee: *Wood* v. *Griffith*, 1 Sw. 43, 56; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338. But where the notice given to the vendor is not of a valid assignment of the contract, but merely of an agreement to execute such an assignment upon request, the vendor is not bound to inquire whether that agreement has been carried out, and may complete the contract with the original purchaser: *Shaw* v. *Foster*, *supra*. See also *Anon.* v. *Walford*, 4 Russ. 372.

So, a covenant, giving the purchaser a right of pre-emption in respect of the mines under the property sold, has been specifically enforced in an action by the assigns of the purchaser

against the devisees of the vendor: *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421.

Assignees of the property.

The vendor may also, of course, sell or charge the benefit of the agreement; and a purchaser from him with notice of the contract will be bound to carry it out: *Potter* v. *Sanders*, 6 Hare, 1.

Death of the vendor.

On the death of the vendor before completion his personal representative may sue or be sued for the specific performance of the contract; but in both cases the heir (*Roberts* v. *Marchant*, 1 Ph. 370), or the devisee (*Williams* v. *Glenton*, L. R. 1 Ch. 200), is a necessary party. And this rule does not seem to have been affected by the 4th section of the Conveyancing Act, 1881, which enables the personal representatives of a deceased vendor to convey the legal estate to the purchaser, where there is "*a contract enforceable against the heir or devisee.*"

Death of the purchaser.

If the purchaser dies before completion his heir or devisee may enforce the contract if it was binding upon the contracting parties: *Buckmaster* v. *Harrop*, 7 Ves. 341; and the heir or devisee not being entitled to require payment of the purchase-money out of the personal estate of the deceased (see 40 & 41 Vict. c. 34), the personal representative should not now be made a party. *Secus*, however, when the vendor seeks to enforce the contract, for the heir or devisee might disclaim, and the personal obligation of paying the purchase-money might continue to bind the estate of the deceased.

Bankruptcy.

The bankruptcy of either party destroys the mutuality of the contract, for the trustee in bankruptcy may enforce, but is not bound by the bankrupt's contract; see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55; *Ex parte Barrell*, L. R. 10 Ch. 512; *Holloway* v. *York*, 25 W. R. 627.

The writ.

The business assigned by the Judicature Act, 1873, s. 34, to the Chancery Division includes "the specific performance of contracts between vendors and purchasers of real estates including contracts for leases;" and a form for the indorsement of the writ of summons is supplied by R. S. C. 1883, Appx. A., Part III., Sect. 1, No. 9. It is as follows:—

"The plaintiff's claim is for specific performance of an agree-

ment dated the ——— day of ———, for the sale by the plaintiff to the defendant of certain [*freehold*] hereditaments at ———."

This can be easily adapted to the case of an agreement for purchase by the plaintiff, an agreement to grant or take a lease, or an agreement contained in several documents.

Claim for recovery of possession.

In cases where it is necessary to recover actual physical possession of the land, leave should be obtained before the issue of the writ to join the two causes of action, specific performance and recovery of land. See R. S. C., Ord. XVIII. r. 2.

Appearance.

If the defendant, having been duly served with the writ, fails to enter an appearance within the proper time, the plaintiff should file a proper affidavit of service and a statement of claim, and thereupon the action may proceed as if the defendant had appeared: R. S. C. 1883, Ord. XIII. r. 12; that is to say, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to: R. S. C. 1883, Ord. XXVII. r. 11.

Defence delivered after time has expired.

A defence, however, delivered after the proper time, but before judgment, cannot be treated as a nullity, but will be taken into account by the Court on the hearing of the motion: *Gill* v. *Woodfin*, 25 Ch. D. 707; *Gibbings* v. *Strong*, 26 Ch. D. 66. And any judgment by default may be set aside upon such terms as to costs or otherwise as the Court or a judge may think fit: R. S. C. 1883, Ord. XXVII. r. 15.

Pleading.

As a general rule, of course, the defendant enters an appearance; and he may, either at the time of doing so, or within eight days thereafter, require a statement of claim to be delivered. The plaintiff must comply with this requisition within five weeks from the receipt of such notice. He may also, within six weeks from the defendant's appearance, deliver a statement, although not required to do so: R. S. C. 1883, Ord. XX. r. 1.

A form of statement of claim will be found in the R. S. C., Appx. C., Sect. 2, No. 12 (sanctioned Ord. XIX. r. 5), but the pleader will in few cases be able to adopt without considerable addition this extremely concise precedent. Whenever the contents of any document are material, the effect should be stated

without setting out the whole or any part thereof, unless the precise words are material: R. S. C., Ord. XIX. r. 21.

Alternative relief.

The plaintiff's case may rest, not upon an agreement in writing, but upon a parol contract part performed (*ante*, p. 25), or he may seek specific performance with compensation (*ante*, p. 364), or ask to have the agreement rectified and then performed (*ante*, p. 422), or frame his case alternatively for specific performance or damages (*post*, sect. 7), or for specific performance or rescission, if the defendant is unable to carry out the contract: *Costigan* v. *Hastler*, 2 Sch. & L. 160, 166; *Clarke* v. *Faux*, 3 Russ. 320. But he cannot, it is conceived, ask for specific performance, or, in the alternative, for rescission on the ground of fraud or mistake; see *Cawley* v. *Poole*, 1 H. & M. 50. He must either adopt or repudiate the contract (*Gray* v. *Fowler*, L. R. 8 Ex. 249), although if he adopts it he may fairly ask the Court to set aside the transaction if it cannot be fully carried out.

The plaintiff may, however, affirm the contract, and at the same time sue for damages in respect of fraudulent representations. See *Rock Portland Cement Co.* v. *Wilson*, 31 W. R. 193; and further as to alternative relief: *Rawlings* v. *Lambert*, 1 J. & H. 458; *Clark* v. *Lord Rivers*, L. R. 5 Eq. 91; *Evans* v. *Buck*, 4 Ch. D. 432; *Child* v. *Stenning*, 5 Ch. D. 695; *Bagot* v. *Easton*, 7 Ch. D. 1; *Cargill* v. *Bowen*, 10 Ch. D. 502; *Evans* v. *Davis*, 10 Ch. D. 747; R. S. C. 1883, Ord. XVI. rr. 4, 7; Ord. XIX. r. 24; Ord. XX. r. 6.

Amendment.

Where the plaintiff failed to make out a case for specific performance he was allowed by the Court of Appeal to amend his claim by asking for the return of the deposit: *Howe* v. *Smith*, 27 Ch. D. 89. See *Hipgrave* v. *Case*, 28 Ch. D. 56.

Contract by letters.

It is important to remember that whenever a contract is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it is sufficient to allege such contract as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail: R. S. C. Ord. XIX. r. 24.

Parol variations.

It has been already stated (*ante*, p. 421) that the plaintiff cannot enforce specific performance of a written agreement with

Ch. XXVIII. s. 2.

a parol variation, whether such variation was introduced at the date of, or subsequently to, the agreement in writing. Nor can a defendant set up a subsequent parol agreement as a defence to the plaintiff's claim. It follows, therefore, that the plaintiff, when parol negotiations have followed the written agreement, may offer in his statement of claim to perform such of the parol stipulations as are in favour of the defendant, and that the Court will decree specific performance of the agreement with those variations, if the defendant elects to take advantage of them, and if he does not so elect, will decree specific performance of the original agreement: *Robinson* v. *Page*, 3 Russ. 114. See also *Martin* v. *Pycroft*, 2 De G. M. & G. 785.

Ambiguous agreement.

Where a written agreement is ambiguous in its terms, and the plaintiff insists upon one construction, the defendant on another, the former cannot, after failing to convince the Court that his construction is the true one, obtain specific performance according to the defendant's contention: *Clowes* v. *Higginson*, 1 Ves. & B. 524. It is different, however, when the Court can construe the agreement with reasonable certainty, and arrives at the conclusion that there was a contract in the sense contended for by the defendant. In that case the plaintiff may abandon his own construction and obtain specific performance according to the true construction of the agreement; see *Preston* v. *Luck*, 27 Ch. D. 497.

The difficulties in the plaintiff's way will become apparent in the discussion of the defendant's case, which is treated in the next section.

Sect. 3.—*The Defendant's Case.*

Statement of defence.

Within ten days from the delivery of the statement of claim, or from the time limited for appearance, the defendant must deliver his defence, unless the time is extended by the Court or a judge: R. S. C., Ord. XXI. r. 6; and as to extending the time, see Ord. LXIV. rr. 7, 8.

There is great variety in the defences which may be raised in cases of specific performance; and a good many have been necessarily considered in the preceding pages. Here it is proposed to classify the grounds of defence, and to offer a few observations on those branches of the subject which have not as yet been fully treated.

Legal and equitable defences.

A clear distinction must, in the first place, be drawn between legal and equitable grounds of defence. Both are available in answer to a claim for specific performance, but the former alone are taken into account in an action for damages; and, as the two forms of action are frequently united, the importance of the distinction is at once apparent. Specific performance is an appeal to the equitable jurisdiction of the Court, and the granting or withholding of that relief has always been considered to rest on the exercise of a judicial discretion. Many circumstances are taken into account which have no place in the mind of a judge who is trying a purely legal right like that of damages for breach of contract.

Legal defences.

Among the legal defences which may be raised, are included those which deny the contract, or its legal validity, those which assert that though there once was a contract it has been rescinded; and those which set up a breach of contract by the plaintiff, so serious in its character as to preclude him from suing.

Equitable defences.

The defences on equitable grounds depend mainly on matters outside the contract, as, for example, great hardship to the defendant, his incapacity to carry out the contract, and the laches or delay of the plaintiff in the assertion of his rights.

Summary of defences.

The various grounds of defence are contained in the following table:—

I. Legal grounds of defence.

1. No contract.
2. Personal incapacity of defendant.
3. Contract illegal.
4. Statute of Frauds.
5. Contract rescinded.
6. Plaintiff's breach of contract.

Ch. XXVIII. s. 3.

II. Equitable grounds of defence.

1. Unfairness.
2. Hardship.
3. Contract not capable of being executed:
   (a) By the Court.
   (b) By the defendant.
4. Laches or delay of the plaintiff.

Denial of the contract.

The denial of the contract goes to the root of the plaintiff's case, and the burthen of proving a concluded contract is on the plaintiff: Fry, Sp. Perf. 119.

Repudiation of agreement.

Although the plaintiff produces an agreement valid on the face of it, the defendant may of course show that he was not the person who contracted, that his signature was forged, or, in case of agency, that the agent had no authority to sign the agreement in question.

Negotiation not contract.

More commonly the plaintiff fails to establish a contract, owing to the transaction having been incomplete; negotiation or treaty merely, and not contract. As to this, see *ante*, p. 58.

Failure to prove agreement.

So, if the plaintiff alleges an agreement contained in several documents, and fails at the trial to produce one of them, or to give evidence of its contents, he cannot have either specific performance or damages: *Post* v. *Marsh*, 16 Ch. D. 395.

No contract as alleged.

The defendant, while admitting *some* contract, may deny that the agreement alleged by the plaintiff contains the real terms of the bargain. The cases bearing on this point are fully considered under the head of *Parol Evidence*, *ante*, p. 421.

Personal incapacity.

The personal incapacity of either party to enter into a binding contract is a valid defence to the action for specific performance; but "if there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit:" *Hall* v. *Warren*, 9 Ves. 605, 611; and see *Owen* v. *Davies*, 1 Ves. sen. 82.

Lunacy.

If the defendant has been found a lunatic from a date prior to the alleged contract, the plaintiff cannot succeed unless he proves that the defendant contracted during a lucid interval: *Hall* v. *Warren*, 9 Ves. 605.

Insanity at the date of the contract is a bar to specific performance, but does not necessarily entitle the lunatic and his

committee to rescission: *Niell* v. *Morley*, 9 Ves. 478; and it seems doubtful whether a conveyance by a lunatic to a person who is ignorant of his state of mind is void or voidable: *Price* v. *Berrington*, 3 Mac. & G. 486.

Infancy.

Contracts by infants are, with certain exceptions (see the Infants Relief Act, 1874, 37 & 38 Vict. c. 62, s. 1), voidable and not void. An infant cannot, therefore, be compelled to complete his contract; nor can he, on the ground of mutuality, sue as plaintiff while his disability continues: *Flight* v. *Bolland*, 4 Russ. 298; *Hargrave* v. *Hargrave*, 12 Beav. 408. Though not bound to complete, he cannot recover his deposit: *Wilson* v. *Kearse*, Peake, Ad. Cas. 196.

In an early case specific performance of an agreement to take a lease was decreed, although the plaintiff was an infant at the date of the agreement. He had, however, attained his majority before filing the bill: *Clayton* v. *Ashdown*, 9 Vin. Abr. 393.

Infants Relief Act.

By the second section of the Infants Relief Act, 1874, it is enacted that no action shall be brought whereby to charge any person upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. This enactment appears to be general, and not confined to the contracts specified in sect. 1: *Coxhead* v. *Mallis*, 3 C. P. D. 439; and see *Northcote* v. *Doughty*, 4 C. P. D. 385; *Ditcham* v. *Worrall*, 5 C. P. D. 410.

If this section applies to contracts for leases or for the sale or purchase of land, there would seem to be some difficulty in maintaining an action for specific performance when either of the contracting parties, though since adult, was an infant at the date of the contract.

Married women.

The disability of coverture as regards contracts has been abolished by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which by sect. 1 (2) enacts that a married woman shall be capable of entering into . . . . any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*. No peculiarity, therefore, arises in actions for specific performance by or against married women in consequence of their coverture.

Illegality.

The illegality of a contract or of any part of a contract is of course a bar to its specific performance, as well as to every other proceeding by which either of the parties may seek to enforce it: Fry, Sp. Perf. 209; and see *Sykes* v. *Beadon*, 11 Ch. D. 170, where Jessel, M. R., said, "I think the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the Court to assist you in carrying it out. You cannot enforce it indirectly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it:" 11 Ch. D. 197.

It has been held that a freehold land society consisting of more than twenty members was not an association for the purpose of carrying on a business that had for its object the acquisition of gain within the meaning of the Companies Act, 1862, s. 4, and therefore did not require to be registered: *Wigfield* v. *Potter*, 45 L. T. 612; see also *Crowther* v. *Thorley*, 32 W. R. 330; *Re Siddall*, 33 W. R. 509.

Statute of Frauds.

The defence of the Statute of Frauds (as to which see *ante*, p. 29) must be expressly raised by the pleadings (R. S. C., Ord. XIX. r. 15); and a denial of the contract is construed only as a denial of the fact of a contract, and not as a denial of its legality or sufficiency in law, whether with reference to the Statute of Frauds or otherwise: *Ibid.* r. 20.

Rescission.

It is, of course, a complete answer to the plaintiff's claim for specific performance to show that the contract has been lawfully rescinded (see Chap. XXX., Rescission), even after the commencement of the action: *Hoy* v. *Smythies*, 22 Beav. 510. And if the defendant is entitled to rescind, although the contract may not have been actually rescinded, the Court will not interfere; see *Howe* v. *Smith*, 27 Ch. D. 89. This issue is frequently raised by counterclaim asking for the formal rescission of the contract, and the return of the deposit; see *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Mullens* v. *Miller*, 22 Ch. D. 194.

Breach of contract.

A serious breach of the contract by the plaintiff disentitles him to specific performance. Thus, there are few cases in which the vendor who has misdescribed the property can enforce specific performance, even with compensation; see *ante*, Ch. XXV., Misdescription and Compensation, p. 364. So, if the

vendor fails to show a title according to the contract, the issue may sometimes be successfully raised by the defence: Fry, Sp. Perf. 382; and see *post*, *Reference of Title*.

Dependent stipulations.

As stated in a subsequent chapter (COMMON LAW REMEDIES, p. 492), the ordinary stipulations in an agreement for the sale and purchase of land are "mutually dependent;" that is to say, neither party can sue on the agreement unless he has performed his part. This applies to specific performance as well as to the legal remedies; and it is accordingly a valid defence to show that the plaintiff has not performed, or is incapable of performing, the stipulations agreed to on his part.

Defence on equitable grounds.

The defences resting upon equitable grounds interpose a bar to the exercise of the discretionary jurisdiction of specific performance, but furnish no answer to the legal remedy under the contract. It was in this large class of cases that the order formerly ran,—Dismiss the plaintiff's bill without prejudice to an action at law. Since the Judicature Act, no such order has been made, and the settled practice is to consider the question of damages in the Chancery Division: *Tamplin* v. *James*, 15 Ch. D. 215.

Unfairness.

A slight misrepresentation or concealment, which would not be a ground for rescinding an executed contract, may furnish a defence to an action of specific performance: see *ante*, p. 384.

Intoxication.

The Court will not give its assistance to a person who has obtained an agreement from another in a state of intoxication: *Cooke* v. *Clayworth*, 18 Ves. 12; *Wiltshire* v. *Marshall*, 14 W. R. 602; *Cox* v. *Smith*, 19 L. T. 517; even where the plaintiff had not contributed to make the defendant drunk, or taken any advantage of his situation: *Cragg* v. *Holme*, 18 Ves. 14, n. But if the agreement be fair, the Court will not order it to be delivered up: *Cory* v. *Cory*, 1 Ves. sen. 19; *secus*, if the price is inadequate: *Davies* v. *Cooper*, 5 My. & Cr. 270. The contract of a drunken man is voidable only, and not void, and is therefore capable of ratification: *Matthews* v. *Baxter*, L. R. 8 Ex. 132. A purchaser with notice of a prior agreement for sale cannot, as against the first purchaser, be heard to say that the vendor was when he signed it incapacitated by drink: *Shaw* v. *Thackray*, 1 Sm. & G. 537.

Ch. XXVIII. s. 3.

Weakness of mind.

Notwithstanding the remark of Lord King that "there is no such thing as an equitable incapacity, where there is a legal capacity" (*Osmond* v. *Fitzroy*, 3 P. Wms. 129), the Court, in estimating the fairness of a contract, and the expediency of enforcing it, constantly takes into account the mental capacity of the contracting parties; see *Clarkson* v. *Hanway*, 2 P. Wms. 203; *Gartside* v. *Isherwood*, 1 Bro. C. C. 558; *Longmate* v. *Ledger*, 2 Giff. 157.

Surrounding circumstances.

The Court will also take into account the age or poverty of the parties, the manner in which the contract was executed, the circumstances that they were acting without a solicitor, that the property was reversionary, or that the price was not the full value: Fry, Sp. Perf. 173. See also *Clark* v. *Malpas*, 4 De G. F. & J. 401; *Baker* v. *Monk*, 4 De G. J. & S. 388; *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814.

Hardship.

Under the head of "Hardship" must be classed those cases of unilateral mistake in which the Court declines to enforce the contract; see *ante*, p. 418.

Inadequacy of price.

Inadequacy of price may be so enormously great as to form a ground for cancelling the contract: per Lord Eldon, *Stilwell* v. *Wilkins*, Jac. 280, 282. It is in such a case taken to be proof positive of fraud: see *Griffith* v. *Spratley*, 1 Cox, 383; *Low* v. *Barchard*, 8 Ves. 133. But without being "enormously great," the inadequacy may be so considerable as to amount to "hardship," and from that point of view furnish a defence to specific performance. For this purpose the inadequacy must also, according to Lord Eldon, be "such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction": *Coles* v. *Trecothick*, 9 Ves. 234, 246.

Inadequacy of price may be a ground for refusing relief.

Assuming that no circumstances of circumvention are before the Court, that the case begins and ends with the inadequacy of the consideration, it is clear that calling it a fraud does not assist in determining whether, in a particular case, the defendant can resist specific performance or not. Lord Justice Fry says that "it seems now to be established by the decisions of Lord Eldon and Grant, M. R., that mere inadequacy of consideration is no defence to specific performance, unless it amount

to an evidence of fraud, and so would furnish a ground even for cancelling the contract": Fry, Sp. Perf. 193.

Specific performance and rescission.

It must, however, be recognised that a lesser amount of inadequacy will suffice to resist specific performance, than will support a claim for the rescission of the contract. In one case the bill and the cross bill for those respective purposes were both dismissed. That is to say, although the Court was satisfied from the inadequacy of the price, that the contract was inequitable, yet it would not actively interfere to set aside the sale: *Day* v. *Newman*, 2 Cox, 77. See also *Young* v. *Clerk*, Pr. Ch. 538.

Vice-Chancellor Kindersley, after examining in an elaborate judgment all the early authorities, came to the conclusion that mere inadequacy of price may be a sufficient ground for refusing specific performance: *Falcke* v. *Gray*, 4 Drew. 651. This case is unfavourably criticized by Lord Justice Fry (Sp. Perf. 195), who points out that—"if inadequacy of consideration short of fraud were a bar to specific performance, the question would arise as to the amount of inadequacy which should so operate—a question not easy to answer." It is to be feared that the question, What amount of inadequacy is evidence of fraud? is quite as difficult to answer.

Immaterial on a sale by auction.

Inadequacy of price where the sale was by auction is never a ground for resisting specific performance: *White* v. *Damon*, 7 Ves. 30; *Haywood* v. *Cope*, 25 Beav. 140, 152.

It is clear that inadequacy of price, coupled with other circumstances of oppression, will avoid the contract: *Davies* v. *Cooper*, 5 My. & Cr. 270; *Cockell* v. *Taylor*, 15 Beav. 103; *Harrison* v. *Guest*, 6 De G. M. & G. 424.

Fairness tested at date of contract.

"The period at which the Court is to examine the agreement between the parties, is the time when they contracted:" *Revell* v. *Hussey*, 2 Ball & B. 280, 288; and, if originally fair, specific performance will not be refused on the ground of hardship because the defendant finds that he cannot effect the purpose for which he entered into the contract: *Webb* v. *Direct London and Portsmouth Ry. Co.*, 9 Hare, 129; 1 De G. M. & G. 521. And on this principle, where the contract is for the sale and purchase of an uncertain thing, as where the boundaries of the

property are known by both parties to be unsettled, neither of them can resist specific performance because the reality has turned out to be different from what he anticipated: *Baxendale* v. *Seale*, 19 Beav. 601; *Jefferys* v. *Fairs*, 4 Ch. D. 448. So also in sales of property in consideration of an annuity, the Court has decreed a specific performance, notwithstanding the death of the annuitant; but in such a case the Court will inquire with some jealousy as to the fairness of the transaction. Per Lord Cottenham, L. C.: *Davies* v. *Cooper*, 5 My. & Cr. 270, 279; see *Mortimer* v. *Capper*, 1 Bro. C. C. 156.

Serious consequences to defendant.

On the ground of hardship specific performance will be refused if the carrying out of the contract will involve the defendant in some unforeseen and serious liability: *Costigan* v. *Hastler*, 2 Sch. & L. 160; *Wedgwood* v. *Adams*, 6 Beav. 600; *Watson* v. *Marston*, 4 De G. M. & G. 230. See *Re G. N. Ry. Co. & Sanderson*, 25 Ch. D. 788.

Injurious effect upon third persons.

It might be imagined that, as the parties to the contract are the only parties to the action, equities between them would alone be taken into account by the Court. This, however, is not so; for the injurious effect upon the interests of third parties is sometimes a bar to specific performance.

Breach of trust.

Thus, when the contract cannot be performed without committing a breach of trust (*ante*, p. 380), or a breach of a prior covenant (*Willmott* v. *Barber*, 15 Ch. D. 96), no decree will be made.

Voluntary settlement.

So, a vendor who has made a voluntary settlement cannot obtain the help of the Court in rendering it nugatory by a sale for value. This seems to be so decided, partly because the plaintiff is bound by the settlement: *Smith* v. *Garland*, 2 Mer. 123; and partly because it may have been made good by matter *ex post facto*: *Johnson* v. *Legard*, T. & R. 281. Hardship occasioned by changes after the date of the contract is in general no defence to an action for specific performance: Fry, Sp. Perf. 183.

Contracts which the Court cannot carry out.

No order can be made for the specific performance of a contract which, from its nature, the Court is incapable of carrying out. Building contracts are those in which this defence is most commonly raised, as to which see *ante*, p. 441.

Impossible to be performed.

In actions for specific performance the Court never gives relief where the act is impossible to be done: per Lord Hardwicke, *Green* v. *Smith*, 1 Atk. 572, 573. When this *dictum* was uttered it was a truism, now it is false; for the Court in such a case will give damages under the common law jurisdiction.

If the defendant contracts to sell an estate which he has not got, and cannot acquire (*Browne* v. *Warner*, 14 Ves. 409, 413), or if he cannot obtain an indispensable consent (*Howel* v. *George*, 1 Mad. 1; *Franklinski* v. *Ball*, 33 Beav. 560), specific performance is of course out of the question. Again, if after the date of the contract the vendor sells and conveys the property to another for valuable consideration and without notice, no specific performance is possible; but even under the old law the Court in such a case awarded damages to the plaintiff: *Denton* v. *Stewart*, 1 Cox, 258; *Nelson* v. *Bridges*, 2 Beav. 239.

Delay.

The last ground of defence which it is necessary to notice is that the plaintiff has been guilty of delay.

Lord Alvanley laid down the rule in words which have frequently been quoted: "It is," he said, "now perfectly known that a party cannot call upon a Court of Equity for a specific performance unless he has shown himself ready, desirous, prompt and eager:" *Milward* v. *Thanet*, 5 Ves. 720, n.

Delay operates as a bar to specific performance in three ways, namely—

Evidence of abandonment.

(1.) It may be evidence of abandonment of the agreement: *Lloyd* v. *Collett*, 4 Bro. C. C. 469. See *post*, p. 518.

Breach of contract.

(2.) When time is of the essence, non-observance of the stipulation as to time is a breach of the agreement which disentitles the plaintiff to relief. See *ante*, p. 278.

Laches.

(3.) Assuming the defendant to be in the wrong, and the plaintiff to have at a given date the right to enforce the contract, he may lose that right by failing to assert it promptly.

The first two of these defences go to the existence of the contract, and are considered elsewhere; the third which alone is a defence on equitable grounds, remains to be noticed.

Laches of

From the cases cited below, it will appear that the defence of

plaintiff when a defence.

the plaintiff's *laches* may be raised, whether the action is by the vendor or the purchaser, and whether the agreement sought to be performed was for a sale or a lease.

Limit of time.

When one party definitely repudiates the contract, the time within which the other must commence his action is not very accurately fixed; but according to Lord Romilly, M. R., "the cases have determined that it must not exceed a year:" *Colby* v. *Gadsden*, 34 Beav. 416, 418. In that case a delay from May to December was disregarded. Lord Rosslyn seems to have thought that fourteen months was not too long to wait before filing the bill: *Marquis of Hertford* v. *Boore*, 5 Ves. 719. A delay of eight months does not seem to amount to laches: *McMurray* v. *Spicer*, L. R. 5 Eq. 527.

On the other hand, a delay of one year (*Watson* v. *Reid*, 1 Russ. & M. 236); two years (*Walker* v. *Jeffreys*, 1 Hare, 341); three years and a half (*Eads* v. *Williams*, 4 De G. M. & G. 674); nearly six years (*Harrington* v. *Wheeler*, 4 Ves. 686); ten years and a half (*Alloway* v. *Braine*, 26 Beav. 575); has been held fatal to the plaintiff's claim.

Property of fluctuating value.

If the property is of fluctuating value the plaintiff must sue with extra promptitude, for the Court will not permit parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and according to the event either to abandon it, or considering the lapse of time as nothing to claim a specific performance: *Alley* v. *Deschamps*, 13 Ves. 225, 228; *Mills* v. *Haywood*, 6 Ch. D. 196, 202.

Lapse of time more important where there is no mutuality.

The question of time becomes of greater importance when there is an absence of mutuality in the contract, *e. g.*, when the note or memorandum is signed only by the defendant: *Williams* v. *Williams*, 17 Beav. 213, 216.

Negotiation.

Time occupied by negotiation does not count as delay. Thus, a contract entered into on the 16th October, 1840, was followed by negotiations lasting until the 20th August, 1841, when the purchaser gave notice to rescind the contract on the ground that the title was defective. The correspondence, however, was continued until the 17th January, 1842, when the purchaser, being still dissatisfied as to the title, intimated that he should fall back to his position under the rescinded contract, and required

the repayment of his deposit with interest and costs. The bill was filed on the 30th August, 1843, and it was held that time only commenced to run against the plaintiff on the 17th January, 1842, but that the unexplained delay after that date precluded the vendor from enforcing specific performance: *Southcomb* v. *The Bishop of Exeter*, 6 Hare, 213. See also *McMurray* v. *Spicer*, L. R. 5 Eq. 527.

When time begins to run.

It is only reasonable that time should be counted against the plaintiff from the date when he might safely have commenced an action. Thus, if one party gives the other notice that he does not hold himself bound to perform, and will not perform the contract between them, and the other contracting party makes no prompt assertion of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the performance of the contract: *Walker* v. *Jeffreys*, 1 Hare, 341, 348.

Not excused by inaction of the other party.

Where the parties are at arms length by a notice of abandonment, the inactivity of the plaintiff will not be excused by the delay of the defendant in taking steps to recover his deposit: *Watson* v. *Reid*, 1 Russ. & M. 236.

Continual claim.

"Continual claim" will not excuse the plaintiff's delay. "I cannot," said Turner, L. J., "agree to a doctrine so dangerous as that the mere assertion of a claim unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded:" *Clegg* v. *Edmondson*, 8 De G. M. & G. 787, 810; *Lehmann* v. *McArthur*, L. R. 3 Ch. 496.

Purchaser in possession.

The doctrine of laches does not apply to a contract which has been in point of fact executed; and where a purchaser or lessee has been in possession he is not prejudiced by delay: *Clarke* v. *Moore*, 1 J. & Lat. 723. Thus, where there was continual possession, an agreement for a lease was specifically enforced after nearly twelve years: *Sharp* v. *Milligan*, 22 Beav. 606.

So, where a lessee signed an agreement to accept a new lease for thirty-one years at the old rent, and to pay a premium of 600*l.* on the day of completion, with subsequent interest at five per cent., he was compelled, after eighteen years, to accept a lease, and to pay the stipulated premium with arrears of inte-

Ch. XXVIII. s. 3.

rest for the whole period: *Shepheard* v. *Walker*, L. R. 20 Eq. 659. In that case the continued possession of the lessee was referred to the new agreement, and not to a holding over after the expiration of the former lease; and it is clear that possession, in order to obviate the consequences of delay, must be possession under the contract sought to be enforced: *Mills* v. *Haywood*, 6 Ch. D. 196.

If a purchaser or lessee takes possession, and afterwards abandons it, time seems to count only from the date of such abandonment: *Eads* v. *Williams*, 4 De G. M. & G. 674; *Sharp* v. *Wright*, 28 Beav. 150.

Constructive possession.

Constructive possession of mines by an occupation of the surface will not operate like actual possession; and, accordingly, delay on the part of intended lessees of the mines, who are also in occupation of the surface, will bar their right to a renewed lease, at all events where the surface owner and the mine owner are different persons: *Walker* v. *Jeffreys*, 1 Hare, 341.

Delay in prosecuting the suit.

Delay in prosecuting a suit, as well as in commencing it, may be a bar to the plaintiff's equitable rights: *Moore* v. *Blake*, 1 Ball & B. 62; *Dorin* v. *Harvey*, 15 Sim. 49; *Reid* v. *London and Staffordshire Fire Insurance Co.*, 32 W. R. 94.

Sect. 4.—*Counter-claim and Reply.*

Counter-claim.

The defendant may, in certain cases, obtain relief by way of counter-claim: Jud. Act, 1873, s. 24 (3); R. S. C. 1883, Ord. XIX. r. 3.

Thus, where the purchaser is a defendant, he may ask that the contract be rescinded and the deposit returned, or in default for a declaration of lien: Fry, Sp. Perf. 616. In like manner the vendor (defendant) may ask that the purchaser deliver up possession, and be charged with an occupation rental. See *Dear* v. *Sworder*, 4 Ch. D. 476.

A cross action.

A counter-claim has the same effect as a cross action, and the

terms of Ord. XIX. r. 3, are large enough to include any case raised by way of defence, whether it is or is not connected with, or of the same character as the plaintiff's claim, and whether it sounds in damages or not: per Kay, J., *Gray* v. *Webb*, 21 Ch. D. 802, 804.

Striking out counterclaim.

But the Court has power to strike out a counterclaim, which will be done if its effect would be to delay the action: *Gray* v. *Webb*, *supra;* see also *McLay* v. *Sharp*, W. N. 1877, 216.

A counterclaim is within the rule which prohibits (with certain exceptions) the joinder without previous leave of an action for the recovery of land with any other cause of action: *Compton* v. *Preston*, 21 Ch. D. 138.

Third persons.

Questions between the defendant "and the plaintiff along with any other persons," may be raised by the counterclaim: R. S. C., Ord. XXI. r. 11; *Dear* v. *Sworder*, 4 Ch. D. 476. A pleading which asks no cross-relief against a plaintiff, either alone or with some other person, is not a counterclaim: per Jessel, M. R., *Furness* v. *Booth*, 4 Ch. D. 586; see *Harris* v. *Gamble*, 6 Ch. D. 748.

Although the plaintiff's action is stayed, discontinued or dismissed, the counterclaim may, nevertheless, be proceeded with: R. S. C. 1883, Ord. XXII. r. 16.

Reply.

The reply of the plaintiff must be delivered within twenty-one days after the delivery of the defence, unless the time is extended: R. S. C. 1883, Ord. XXIII. r. 1; and if it consists simply of a joinder of issue, the pleadings are then closed: *Ibid.* r. 5. More than this is seldom required in actions for specific performance; but cases may occur in which the waiver by the defendant of some breach of contract, or defect of title, can be most conveniently alleged at this stage of the action. Thus, if the plaintiff states an agreement in writing signed by the defendant for the purchase of land, and the defence sets up a defect in the title or in the property, the reply may allege that the defect has been waived by the defendant, as to which see *post*, *Reference of Title*, p. 472.

Waiver.

Sect. 5.—*Proceedings in the Action before Trial.*

In some cases a portion of the relief to which the plaintiff is entitled may be obtained in a summary manner before the trial of the action.

Account.

If the amount of the purchase-money depends on the taking of an account, and there is no preliminary question to be tried, an order for that purpose may be obtained on summons after the time for entering an appearance has expired: R. S. C. 1883, Ord. XV.

Point of law.

Where the right to relief depends on a point of law, it may, by consent of the parties or by order of the Court or a judge, be set down for hearing and disposed of at any time before the trial: R. S. C. 1883, Ord. XXV. r. 2. This rule would include such cases as *Crossley* v. *Maycock*, L. R. 18 Eq. 180; *Hussey* v. *Horne Payne*, 8 Ch. D. 670, 4 App. Cas. 311, where the question, contract or no contract, was decided on demurrer.

Statute of Frauds.

So, also, questions as to the compliance with the Statute of Frauds may be decided under this order.

Questions of title.

Again, if the issue is whether the vendor has a good title, and that depends on the construction of a document or other matter of law, a decision may be obtained in this manner. The procedure under this order is in one respect not so advantageous as that by demurrer which it replaces; for, where the decision of the question of law substantially disposes of the whole action, it obtains no priority, but has to take its place in the general list of actions set down for trial: *Re Thorniley*, 32 W. R. 539.

Admissions of fact.

Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings or otherwise, apply to the Court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties: R. S. C. 1883, Ord. XXXII. r. 6.

Generally on motion, not summons.

There is jurisdiction to make an order under this rule on summons: *Padgett* v. *Binns*, W. N. 1884, 10; *Gough* v. *Heatley*, 32 W. R. 385. But the usual practice is to apply by motion: *Cook* v. *Heynes*, W. N. 1884, 75.

Contract admitted.

Where the contract is admitted by the defendant, judgment may be obtained under this rule declaring the plaintiff's right to have the agreement specifically performed if a good title can be made, and directing an inquiry as to the title. For form of order, see Seton, p. 1297, and see *post*, *Reference of Title*, p. 472.

An inquiry as to title may also be obtained under R. S. C. 1883, Ord. XXXIII. r. 2; but it is conceived that this will only be directed in a case where there is no question for decision but that of title; for otherwise after a certificate on the title there might be a decision that there was no subsisting agreement: *Morgan* v. *Shaw*, 2 Mer. 138, 140. See also *Balmanno* v. *Lumley*, 1 Ves. & B. 224; *Bonner* v. *Johnston*, 1 Mer. 366, 372; *Foxlowe* v. *Amcoats*, 3 Beav. 496; *Boyes* v. *Liddell*, 1 Y. & C. C. 133; *Wood* v. *Machu*, 5 Hare, 158.

The order will, however, be made if the other ground of objection is frivolous: *Boehm* v. *Wood*, 1 Jac. & W. 419; *Withy* v. *Cottle*, T. & R. 78.

Payment into Court.

It has been already stated that the deposit should on request be paid into Court, and that, in case of refusal, the auctioneer or other depositee may be made a party: *ante*, p. 113.

The balance of the purchase-money may also, in some circumstances, be ordered into Court.

When purchase-money ordered into Court.

The circumstances in which an unpaid vendor can require a purchaser in possession to pay the purchase-money into Court must now be considered.

Admission of title; purchaser in possession.

A purchaser in possession who has admitted a good title will be ordered to pay the money into Court: *Crutchley* v. *Jerningham*, 2 Mer. 502.

Title disputed.

If he has not accepted the title, the question depends first, upon the circumstances of his obtaining possession; secondly, upon the manner in which he has dealt with the property; and thirdly, upon the conduct of the parties as giving rise to the action.

Purchaser taking possession without consent.

A purchaser who takes possession without the consent or privity of the vendor cannot retain both the land and the money. He must pay his money into Court: *Blackburn* v. *Stace*, 6 Mad. 69.

Possession

"Where under a contract for the purchase of an estate pos-

Ch. XXVIII. s. 5.

under contract.

session has been taken, and the estate is, therefore, taken out of the hands of the owner, the Court should have a great anxiety to take the money from the purchaser; but cannot go that length, when under the agreement the vendor has thought proper to put the purchaser in possession with an understanding between them that he shall not pay his money, until he has a title. If the vendor has been so foolish he must abide by his contract; but where both parties are acting under the confidence of a speedy title, which confidence is not made good, and that is a surprise upon both, though it would be too much to call upon the person taking possession of the land to pay the money before he has his title, yet in that case of mutual surprise there can be no justice in permitting him to keep possession of the land:" per Lord Eldon, *Gibson* v. *Clarke*, 1 Ves. & B. 500.

Possession taken under the agreement, or by the permission of the vendor, does not of itself entitle the vendor to have the purchase-money paid into Court: *Clarke* v. *Elliott*, 1 Mad. 606; *Morgan* v. *Shaw*, 2 Mer. 138; *Pryse* v. *Cambrian Ry. Co.*, L. R. 2 Ch. 444.

Election to pay or give up possession.

In the absence of a special stipulation as to possession the purchaser who objects to the title will be put to his election whether he will deliver up possession, or pay the purchase-money into Court: *Clarke* v. *Wilson*, 15 Ves. 317; *Smith* v. *Lloyd*, 1 Mad. 83; *Morgan* v. *Shaw*, 2 Mer. 138; *Wickham* v. *Evered*, 4 Mad. 53; *Tindal* v. *Cobham*, 2 Myl. & K. 385. And this, although by the agreement a large part of the purchase-money was to be secured by a mortgage of the estate: *Younge* v. *Duncombe*, You. 275; and see *Buck* v. *Lodge*, 18 Ves. 450; or although the agreement provided for payment of interest by the purchaser in case of delay: *Burroughs* v. *Oakley*, 1 Mer. 52, 376.

Possession must be *qua* purchaser.

If the purchaser was in possession as tenant at the time of entering into the contract (*Bonner* v. *Johnston*, 1 Mer. 366), or under a prior verbal agreement (*Fox* v. *Birch*, 1 Mer. 105), the application cannot be granted.

Acts of ownership.

The purchaser in possession may have so dealt with the property as to render it inequitable to rescind the contract. In this case the purchaser is deprived of his election between

restoring the possession and paying the purchase-money, and will generally be compelled to do the latter.

Thus an order for payment has been made where the purchaser had ploughed up part of the meadow land, filled in ditches, and grubbed up hedges: *Cutler* v. *Simons*, 2 Mer. 103.

For various acts of ownership which have been held to entitle the vendor to an order for payment, see *Cutler* v. *Simons*, *supra*, at p. 106.

Slight acts of ownership exercised after the discovery of an objection to the title, are sufficient to support the application: *Dixon* v. *Astley*, 1 Mer. 133. See also *Bradshaw* v. *Bradshaw*, 2 Mer. 492; *Osborne* v. *Harvey*, 1 Y. & C. C. 116.

Deterioration of property.

Any deterioration of the property occasioned by the purchaser seems to be sufficient to deprive him of his option: *Pope* v. *Great Eastern Rail. Co.*, L. R. 3 Eq. 171.

Improvements.

Improvements on the estate, *e. g.*, draining and putting a new roof on the house, increase the value of the vendor's lien; and will not in general furnish a reason for ordering the purchaser to pay the money into Court: *Bramley* v. *Teal*, 3 Mad. 219; *Gell* v. *Watson*, *ibid.* 225.

Nature of subject.

When the purchaser of mines is working them, the purchase-money will be ordered into Court: *Buck* v. *Lodge*, 18 Ves. 450.

Express contract.

If the contract expressly provides for delay in completion, as by making interest payable at an increased rate, the rights of the parties depend on the agreement, and the purchaser, although in default, will not be compelled to pay the purchase-money into Court: *Pryse* v. *Cambrian Rail. Co.*, L. R. 2 Ch. 444, see *Burroughs* v. *Oakley*, 1 Mer. 52.

Laches of the vendor.

In the absence of stipulation on the subject, delay due to the *laches* of the vendor may disentitle him to relief: *Fox* v. *Birch*, 1 Mer. 105; whereas delay arising out of obstacles created by the purchaser furnishes an additional reason for compelling him to pay the purchase-money: *Burroughs* v. *Oakley*, 1 Mer. 52.

Delay of the purchaser.

Order generally made only on admissions.

It is a general rule that the Court cannot on motion order money to be paid into Court unless it has a distinct admission of the defendant that the money is in his hands; per Lord Langdale, *Boschetti* v. *Power*, 8 Beav. 98. But this admission need not be contained in the pleadings. It is sufficient if the

fact can be ascertained from the balance of affidavits (*Jervis* v. *White*, 6 Ves. 738), from an unanswered affidavit of the applicant (*Freeman* v. *Cox*, 8 Ch. D. 148), or from letters before action (*Hampden* v. *Wallis*, 27 Ch. D. 251).

Rule as between vendor and purchaser.

As between vendor and purchaser the rule as to admissions does not seem to have been strictly applied, at least so far as the fact of possession is concerned.

Fact of possession and acts of ownership may be proved by affidavit.

This has in several cases been allowed to be proved by affidavit: *Burroughs* v. *Oakley*, 1 Mer. 52, explained 1 Mer. 376; *Boothby* v. *Walker*, 1 Mad. 197; *Blackburn* v. *Stace*, 6 Mad. 69; and acts of ownership by the purchaser may be similarly proved: *Cutler* v. *Simons*, 2 Mer. 103. But it is conceived that the rule as to admissions applies to the fact of a contract, and the non-payment of the money. At all events if the purchaser denies either of these the money will not be ordered into Court on an interlocutory application.

Time given to the purchaser.

The time within which the money must be paid in is expressed in the order, and varies with the circumstances of the case. Thus, one month (*Buck* v. *Lodge*, 18 Ves. 450; *Wickham* v. *Evered*, 4 Mad. 53); six weeks (*Boothby* v. *Walker*, 1 Mad. 197; *Bradshaw* v. *Bradshaw*, 2 Mer. 492), two months (*Tindal* v. *Cobham*, 2 Myl. & K. 385), and a conditional term of three months (*Dixon* v. *Astley*, 1 Mer. 133, 378), have been allowed.

Injunction to restrain acts of ownership by purchaser.

The Court will restrain by injunction a purchaser in possession from committing acts of ownership tending to alter the nature of the property: *Cutler* v. *Simons*, 2 Mer. 103, 105; or to diminish the value of the property, as by cutting timber; for the vendor is in the position of an equitable mortgagee: *Crockford* v. *Alexander*, 15 Ves. 138; *Petley* v. *Eastern Counties Ry. Co.*, 8 Sim. 483; *Marshall* v. *Watson*, 25 Beav. 501. *A fortiori* when the sale is by the Court: *Casamajor* v. *Strode*, 1 Sim. & St. 381.

To restrain the vendor from conveying the legal estate.

An injunction will be granted to restrain the vendor from conveying the legal estate to a third person, if the contract is not denied: *Spiller* v. *Spiller*, 3 Sw. 556. See also *Echliff* v. *Baldwin*, 16 Ves. 267; *Curtis* v. *M. of Buckingham*, 3 Ves. & B. 168; *G. W. Ry. Co.* v. *Birmingham Ry. Co.*, 2 Ph. 597, 602; *London and County Banking Co.* v. *Lewis*, 21 Ch. D. 490; and

as to enforcing the undertaking as to damages in such a case, see *Graham* v. *Campbell*, 7 Ch. D. 490.

But where the right to specific performance is doubtful, the order may be refused on the balance of convenience: *Hadley* v. *London Bank of Scotland*, 3 De G. J. & S. 63.

Obstructing valuers.

An injunction has also been granted restraining a vendor from obstructing the valuers in making their valuation: *Smith* v. *Peters*, L. R. 20 Eq. 511.

Sect. 6.—*Judgment and consequent Directions.*

Form of judgment.

The form of the judgment depends to some extent upon whether any order has been obtained before the hearing or not. Assuming, however, that the case comes before the Court for the first time, and that the plaintiff succeeds, the judgment begins with a declaration that the agreement ought to be specifically performed and carried into execution in case a good title can be made to the premises comprised therein: Seton, 1297. Then follow inquiries whether a good title can be made, and when such title was first shown.

Title accepted or established.

If the title has been accepted, or established at the hearing, so that no reference is necessary, the judgment assumes a somewhat different shape. It is then only necessary to ascertain what is payable in respect of the purchase-money, to provide for the costs, and to direct a conveyance. With this object, after the introductory declaration that the agreement ought to be specifically performed, the order directs an account of what is due to the vendor for interest, and payment of the purchase-money and interest upon the execution of a proper conveyance: *Rhodes* v. *Thornton*, W. N. 1884, 89, correcting the form in Seton, 1303. As to the form of the judgment when the purchase-money is payable by instalments, see *Nives* v. *Nives*, 15 Ch. D. 649.

Vendor in possession.

Where the vendor has remained in possession, it is also necessary, in most cases, to direct an account of the rents and profits

Ch. XXVIII. s. 6.

received by him since the date fixed for completion; or if the vendor has been in personal occupation to charge him with a rent to be ascertained in chambers. In special circumstances, too, particular forms of inquiry must be added, *e. g.*, as to deterioration of the property: *Phillips* v. *Silvester*, L. R. 8 Ch. 173; Seton, 1305; or as to the amount of compensation to be allowed for misdescription: Seton, 1314.

Deterioration and compensation.

Reference of title.

In cases where the sole issue between the parties is the question of title, an inquiry on the subject may as already stated (*ante*, p. 467) be directed upon an interlocutory application; and it is the duty of a vendor to avail himself of the opportunity of having in such a case an immediate reference: *Phillipson* v. *Gibbon*, L. R. 6 Ch. 428, 435.

But if the purchaser resists specific performance on other grounds, as for example laches on the part of the plaintiff (*Blyth* v. *Elmhirst*, 1 Ves. & B. 1), or misdescription (*Paton* v. *Rogers*, 1 Ves. & B. 351), no reference will be directed until the hearing.

Where reference not directed.

No reference of title is directed (1) where the vendor is plaintiff, and the Court on the hearing has the means of judging and decides against the title: *Rose* v. *Calland*, 5 Ves. 186; *Omerod* v. *Hardman*, 5 Ves. 722; (2) where the purchaser is plaintiff and accepts the title; and (3) where the vendor is plaintiff and he proves that the purchaser has waived the right further to inquire into the title: Fry, Sp. Perf. 563; and see *ante*, p. 247.

Purchaser may generally insist on reference.

It seems that when the vendor is plaintiff the purchaser has an absolute right to a reference, unless he has accepted the title; and he may insist on this right although his only objection to the title can be determined at the hearing, and even if he makes no objection whatsoever to the title as shown by the abstract: *Jenkins* v. *Hiles*, 6 Ves. 646.

Open reference.

When the inquiry is directed in general terms, whether the vendor can make a good title, it means a good title according to the contract (*Upperton* v. *Nickolson*, L. R. 6 Ch. 436); and thus the contract may be so stringent as to exclude any right to a reference, as where the vendor sells only such interest as he has: Fry, Sp. Perf. 558. In the absence of special directions, the purchaser may under the reference raise objections which had

been raised and abandoned before the action: *Curling* v. *Austin*, 2 Dr. & Sm. 129.

Special directions.

The vendor, if he wishes to preclude the purchaser from raising any objection to the title, which it is open to him to raise under the contract, must have special directions on the subject inserted in the judgment: *Upperton* v. *Nickolson*, L. R. 6 Ch. 436.

Chief clerk's certificate.

The question of title being referred to the chief clerk, the result of the inquiry is expressed in a certificate (as to which see R. S. C. 1883, Ord. LV. rr. 65—71), which is filed in the Central Office, and thenceforth binds all parties unless discharged or varied upon application by summons, to be made before the expiration of eight clear days after the filing of the certificate: *Ibid.* r. 70. Points of difficulty are in general brought before the Court in this manner, the summons to vary being adjourned so as to come on with the further consideration of the action.

What title forced on purchaser.

It is said by Lord St. Leonards that "to enable equity to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion; for it would be an extraordinary proceeding, for a Court of Equity to compel a purchaser to take an estate which it cannot warrant to him. It has, therefore, become a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title:" Sugden, V. & P. 385.

The learned author, indeed, in the next paragraph points out that every title is either good or bad; and, accordingly, the Court ought, in every case, to decide either for or against the title. This, however, it sometimes declines to do; and it becomes important to ascertain, if possible, by what principles the Court is guided in holding a title to be doubtful.

Doubtful titles.

The doubt affecting the title may obviously be either of law or of fact; and a doubtful question of law may relate either to general law, or to the construction of some instrument which has no operation except upon the particular property. It is necessary to distinguish these several ways in which a title may be "doubtful."

General law.

Questions of general law will, as a rule, be decided one way or the other. Thus, in a case where trustees were selling under

Ch. XXVIII. s. 6.

a power of sale which could only be exercised with the consent of the tenant for life, and the tenant for life had alienated his interest, and, according to the purchaser's contention, had thereby lost his power of consenting to the sale, James, L. J., said, "We do not say that there may not be cases in which a question of law may be considered so doubtful that a Court would not, on its own view, compel a purchaser to take a title; still, as a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined. The exceptions to this will probably be found to consist not in pure questions of legal principle, but in cases where the difficulty and the doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument:" *Alexander* v. *Mills*, L. R. 6 Ch. 124, 131.

Instances.

So a title depending on the question, Does a gift to an unmarried woman for life, with remainder to her husband in fee, vest an indefeasible estate in the person who first answers the description of her husband? was forced upon a purchaser: *Radford* v. *Willis*, L. R. 7 Ch. 7. See also the following cases where titles depending on general principles of law were forced on the purchasers: *Dorling* v. *Claydon*, 1 H. & M. 402; *Bull* v. *Hutchens*, 32 Beav. 615; *Cruikshank* v. *Duffin*, L. R. 13 Eq. 555; *Bell* v. *Holtby*, L. R. 15 Eq. 178; *Forster* v. *Abraham*, L. R. 17 Eq. 351; *Osborne to Rowlett*, 13 Ch. D. 774.

The case last cited involved, using the words of Jessel, M. R., "one of those curious questions of real property law not depending upon any ascertained or ascertainable principle but simply upon authority," and although the Master of the Rolls considered that there was no binding decision on the point, he felt compelled to decide whether the title was good or bad. This seems to conflict with the law as laid down by Sir G. Turner in the following passage: "The Court is to judge whether the general law upon the point is or is not settled, enforcing specific performance in the one case, and refusing to enforce it in the other" (*Pyrke* v. *Waddingham*, 10 Hare, 1, 8), and in the most recent case on the subject, Lord Selborne, L. C., said, "When you

Question of general law not settled.

have a question raised upon the construction of a general statute if there is any reasonable ground for saying that that question is not determined by previous authorities, or that the previous authorities are conflicting, then in the terms of Lord Justice Turner's judgment in *Pyrke* v. *Waddingham*, that cannot be treated as a question of general law so settled that the Court will force the title on the purchaser": *Palmer* v. *Locke*, 18 Ch. D. 381, 388.

It must, however, be observed that a title depending on the construction of a general statute will sometimes be forced upon a purchaser, although the case is of the first impression: *Beioley* v. *Carter*, L. R. 4 Ch. 230; *Bell* v. *Holtby*, L. R. 15 Eq. 178. And where there are conflicting decisions, the judge may follow that which commends itself to his mind, and enforce specific performance according to that construction: *Baker* v. *White*, L. R. 20 Eq. 166.

Decision binding only upon the parties.

The difficulty in cases of "doubtful" titles arises from the fact that the decision "does not technically bind any one else but the parties actually before the Court, and does not prevent any person not bound by the decision from at any time bringing fresh litigation upon the purchaser with reference to the same title:" Jessel, M. R., *Osborne to Rowlett*, 13 Ch. D. 774, 781.

The union of the Courts has diminished the chances of a purchaser being ejected at law, after having been compelled by a Court of equity to accept a title "doubtful" according to general law. Moreover, the objection would seem to have less force in the Court of Appeal than in the Court of first instance; and none at all in the House of Lords where a declaration of the law may be made absolutely binding upon all the Courts.

When question of general law make title doubtful.

In this state of the authorities it would seem that on questions of general law the Court will only consider a title doubtful if the question—(1) has not been previously decided; (2) is one of difficulty; and (3) is one which, although the judge may be in favour of the title, in his opinion might be differently decided by another judge. See *Mullings* v. *Trinder*, L. R. 10 Eq. 449, where Lord Romilly, M. R., while approving the principles laid down in *Pyrke* v. *Waddingham*, compelled a purchaser to accept

Ch. XXVIII. s. 6.

the title which Lord Justice Turner had in that case decided to be doubtful. See also *Collard* v. *Sampson*, 4 De G. M. & G. 224.

Construction of particular instrument.

If the doubts arise upon the construction of particular instruments, and the Court is itself doubtful upon the points, specific performance must, of course, be refused: per Sir G. Turner, V.-C., *Pyrke* v. *Waddingham*, 10 Hare, 1, 9; and see the cases there cited. See also *Sykes* v. *Sheard*, 2 De G. J. & S. 6.

Adverse decision.

So, if there has been a decision adverse to the title, the Court, although of an opposite opinion on a question of construction, will not compel the purchaser to take the title: *Mullings* v. *Trinder*, L. R. 10 Eq. 449, 454.

If clear specific performance decreed.

But if the construction is reasonably clear specific performance will be decreed; see *Warneford* v. *Thompson*, 3 Ves. 513; *Hamilton* v. *Buckmaster*, L. R. 3 Eq. 323; where the conveyancing counsel had advised against the title: *Austin* v. *Tawney*, L. R. 2 Ch. 143; *Wyman* v. *Carter*, L. R. 12 Eq. 309; *Cooper* v. *Kynock*, L. R. 7 Ch. 398; *Re White and Hindle's Contract*, 7 Ch. D. 201.

It has been asserted by Malins, V.-C., that, where doubtful cases of construction arise, whether on an Act of Parliament, or the words of an instrument or will, it is the duty of the Court to remove that doubt by deciding it: *Bell* v. *Holtby*, L. R. 15 Eq. 178, 193.

Title forced on purchaser reversing decision of Court below.

An unfavourable decision in a Court of inferior jurisdiction does not render the title doubtful; for, if in such a case the judge of the superior Court abstained from exercising his discretion, the effect would be to leave the ultimate decision of the question to the Court below: *Sheppard* v. *Doolan*, 3 Dru. & War. 1, 8; *Beioley* v. *Carter*, L. R. 4 Ch. 230; *Alexander* v. *Mills*, L. R. 6 Ch. 124, 132; *Radford* v. *Willis*, L. R. 7 Ch. 7; *Cooper* v. *Kynock*, L. R. 7 Ch. 398. See, however, *Collier* v. *McBean*, L. R. 1 Ch. 81; and the observations of Jessel, M. R., thereon in *Collier* v. *Walters*, L. R. 17 Eq. 252, 260.

Doubtful facts.

Where the blot on the title arises from a doubt as to some particular fact, it is conceived that unless the doubt is removed the purchaser cannot be compelled to complete. The vendor is bound to prove his title unless the purchaser waives his strict rights in this respect; see *Games* v. *Bonnor*, 33 W. R. 64.

In cases where there is a presumption as to a fact, Sir J. Leach, V.-C., has laid down the rule, that if the case be such, that sitting before a jury, it would be the duty of a judge to give a clear direction in favour of the fact, then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to a jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser: *Emery* v. *Grocock*, 6 Mad. 54, 57. In this case the surrender of a term was presumed.

Of conveyance.

The presumption in favour of a conveyance having been made by trustees will in general be allowed to prevail whenever it was the declared duty of the trustees to convey to the beneficial owner at a specified time: *England* v. *Slade*, 4 T. R. 682; *Doe* v. *Sybourn*, 7 T. R. 2; *Wilson* v. *Allen*, 1 Jac. & W. 611; and a like presumption will probably arise where the duty to convey, though not expressly declared, may constructively be gathered from the object of the trust: *Hillary* v. *Waller*, 12 Ves. 239, 252. As to cases in which the title depended on questions of fact, see *Lord Braybroke* v. *Inskip*, 8 Ves. 417 (illegitimacy); *Lowes* v. *Lush*, 14 Ves. 547 (act of bankruptcy); *Smith* v. *Death*, 5 Mad. 371 (qualification of object of power); *Re Huish's Charity*, L. R. 10 Eq. 5 (whether a particular exercise of a power was fraudulent or not); *Re Bridges and McRae's Contract*, 30 W. R. 539 (non-existence of rights of common).

When a good title was shown.

The reference of title invariably includes an inquiry *when* a good title was first shown, because, as an ordinary rule, costs are given against a vendor up to the time at which he has first shown a good title: *Phillipson* v. *Gibbon*, L. R. 6 Ch. 428, 434. And see, as to costs, *post*, p. 481. The vendor may complete an *imperfect* title at any time before the certificate is filed; but when he is found to have had *no* title at the date of the contract, he cannot obtain a decree, although by purchase or otherwise he has subsequently acquired the power of carrying out the contract: Sugden, V. & P. 217; *Forrer* v. *Nash*, 35 Beav. 167. Lord Eldon has observed, that the rule of compelling a purchaser to take the estate when a title is not made till after the contract should not be extended to any case to which it had not already been applied (*Lechmere* v. *Brasier*, 2 Jac. & W. 287,

289); and the rule accordingly was not observed when the vendor had no title to a very small portion of the estate: *Chamberlain* v. *Lee*, 10 Sim. 444. The Court will not decline to enforce specific performance on the ground of a defect in title, when the defect admits of compensation, and is of trivial importance (see *ante*, p. 364), or where the purchaser, on discovering that the vendor had no title, does not repudiate the contract, but, on the contrary, assists him in acquiring a title (*Hoggart* v. *Scott*, 1 Russ. & M. 293), or continues the negotiation: *Eyston* v. *Simonds*, 1 Y. & C. C. 608; *Salisbury* v. *Hatcher*, 2 Y. & C. C. 54.

Sect. 7.—*Damages.*

Damages and compensation.

The Court of Chancery does not seem to have had, or, at all events, exercised jurisdiction to give damages for breach of contract. Lord Eldon professed himself "not aware that this Court would give relief in the shape of damages; which is very different from giving compensation out of the purchase-money": *Todd* v. *Gee*, 17 Ves. 273, 278; see *Kendall* v. *Beckett*, 2 Russ. & M. 88. Damages are, in fact, a substitution for the contract; compensation, the difference in value between what was agreed to be done and what is actually carried out.

Lord Cairns' Act.

By the Chancery Amendment Act, generally called Lord Cairns' Act (21 & 22 Vict. c. 27), power was conferred upon the Court, in all cases where it had jurisdiction to enforce specific performance, to award damages to the party injured, either in addition to or in substitution for such specific performance.

Repealed.

This Act has been repealed by the Statute Law Revision and Civil Procedure Acts, 1881 and 1883 (44 & 45 Vict. c. 59, 46 & 47 Vict. c. 49); but these Acts contain words preserving the jurisdiction of the Court notwithstanding the repeal. It is not, however, necessary to have recourse to Lord Cairns' Act, for it is clear that the Court now has power to give damages as

alternative relief: per Baggallay, L. J., *Sayers* v. *Collyer*, 28 Ch. D. 103, 108.

Common law jurisdiction.

The High Court of Justice has power, which it seems it is bound to exercise, of granting relief in respect both of legal and of equitable claims. See Jud. Act, 1873, s. 24 (7).

In order to invoke the common law jurisdiction of the Court, the statement of claim should ask specifically for damages either simply or in the alternative: R. S. C. 1883, Ord. XX. r. 6. The omission, however, of a claim for damages may by leave of the Court be rectified at the hearing: *Ibid.* Ord. XXVIII. r. 1. But leave will not be granted as of course: *Hipgrave* v. *Case*, 28 Ch. D. 356. No denial or defence is necessary as to damages claimed, or their amount; but they are deemed to be put in issue in all cases unless expressly admitted: *Ibid.* Ord. XXI. r. 4.

It is important to distinguish between the jurisdiction under Lord Cairns' Act and that under the Judicature Act; for the former gives a discretionary power to the Court which cannot be exercised unless specific performance might have been ordered: Fry, Sp. Perf. 550. *Rogers* v. *Challis*, 27 Beav. 175; *Lewers* v. *Earl of Shaftesbury*, L. R. 2 Eq. 270; *Ferguson* v. *Wilson*, L. R. 2 Ch. 77; *Aynsley* v. *Glover*, L. R. 18 Eq. 544, 554; *Smith* v. *Smith*, L. R. 20 Eq. 500; *Wood* v. *Silcock*, 32 W. R. 845; but see *Howe* v. *Hunt*, 31 Beav. 420. But if specific performance was rendered impossible by circumstances arising after the action had been commenced, damages might have been awarded: *Catton* v. *Wyld*, 32 Beav. 266.

Thus, if before the trial the defendant performs the contract, the plaintiff is not thereby deprived of his right to damages for the injury caused by the defendant's delay: *Cory* v. *Thames Iron Works Co.*, 11 W. R. 589.

But if specific performance is rendered impossible by the default of the plaintiff, his right to damages under Lord Cairns' Act seems to be gone: *De Brassac* v. *Martyn*, 11 W. R. 1020. Whereas, under the Judicature Act, the plaintiff, who claims damages in the Chancery Division, asserts a legal right which, in a proper case, the Court is bound to recognize.

In a recent case, where the plaintiff claimed specific perform-

ance, or in the alternative 100*l.* as liquidated damages, being the sum fixed by the contract, the Court of Appeal refused to consider the question of damages, on the ground that the plaintiff had, by selling the property, put it out of his power to perform the contract. The claim for damages was treated, not as the assertion of a legal right, but merely as ancillary to specific performance; and leave to amend so as to raise a case for damages was refused: *Hipgrave* v. *Case*, 28 Ch. D. 356.

Assessment.

Under both jurisdictions, the Court can assess the damages in respect of any continuing cause of action down to the time of the assessment; and is not confined to the amount sustained anterior to the issue of the writ: *Fritz* v. *Hobson*, 14 Ch. D. 542, 556; R. S. C., Ord. XXXVI. r. 58.

In lieu of specific performance.

As to the circumstances in which the Court will give damages in lieu of specific performance, see *Wilson* v. *Northampton Rail. Co.*, L. R. 9 Ch. 279.

In addition to specific performance.

And as to the circumstances in which damages will be awarded in addition to specific performance, see *Soames* v. *Edge*, John. 669; *Samuda* v. *Lawford*, 4 Giff. 42; *Middleton* v. *Greenwood*, 2 De G. J. & S. 142; *Jaques* v. *Millar*, 6 Ch. D. 153.

The damages are frequently assessed by the Court at the trial, but an inquiry in chambers may be directed, see Dan. Ch. Pr. 707.

Lord Cairns' Act was not intended to confer any new right to damages, and no damages can therefore be recovered under it which could not be recovered in an action at law: *Rock Portland Cement Co.* v. *Wilson*, 31 W. R. 193.

No damages on rescission.

When a defendant is unable to carry out a decree for specific performance, the plaintiff may apply by motion to have the agreement rescinded, but he cannot obtain damages as well for the breach of agreement: *Henty* v. *Schröder*, 12 Ch. D. 666.

Capn. of Hull v. Morden W.N. 1885 p. 130.

Without prejudice to an action.

Both legal and equitable remedies are now given by the same Court; and where, under the old practice, the bill, if dismissed, would have been dismissed without prejudice to an action at law, the Court is bound, on refusing specific performance, to consider the question of damages: *Tamplin* v. *James*, 15 Ch. D. 215.

SECT. 8.—*Costs.*

Discretion of the Court or judge.

Although the costs of and incident to all proceedings in the Supreme Court are in the discretion of the Court or judge (R. S. C. 1883, Ord. LXV. r. 1), yet the discretion is exercised, not arbitrarily, but according to approximately fixed principles, which must be here briefly considered.

In particular cases, of course, special circumstances prevent the application of the general rules; yet it is not, on that account, the less necessary to state them. Four cases have to be treated, for the action may be either by the vendor or the purchaser, and in each case may be either successful or dismissed.

General rule.

The rule is, that a plaintiff obtaining a decree for specific performance is entitled to the general costs of the action: *Abbott* v. *Sworder*, 4 De G. & S. 448, 459.

VENDOR PLAINTIFF. Decree with costs.

A vendor plaintiff, therefore, will obtain a decree with costs if the title is clear and a futile objection of the purchaser occasioned the suit: *Morris* v. *Debenham*, 2 Ch. D. 540, 547; or, although both parties were in the wrong as to the amount of interest payable, which was the only point in dispute, if the Court, from the general conduct of the parties, concludes that the suit was occasioned by the defendant: *Sherwin* v. *Shakspeare*, 17 Beav. 267, affd. 5 De G. M. & G. 517. See *Lawes* v. *Gibson*, L. R. 1 Eq. 135; *Peter* v. *Nicolls*, L. R. 11 Eq. 391.

So, if the purchaser resists specific performance on an unfounded allegation of misdescription, he has to pay the costs: *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1; or if he questions unsuccessfully the validity of the contract: *Abbott* v. *Sworder*, 4 De G. & S. 448, 460.

Costs of the hearing.

Where the title has not been accepted, there must as a rule be an inquiry in chambers on the subject (see *ante*, p. 472); but, where the purchaser's conduct has been unjustifiable in raising defences which are overruled at the hearing, the Court will declare that, whatever may be the result in chambers, (which may of course be against the title) the costs up to and including the hearing must be paid by the purchaser: *M'Murray* v. *Spicer*, L. R. 5 Eq. 527, 544; following *Parkin* v. *Thorold*, 16 Beav. 59.

Good title not shown till after action.

A vendor who has not shown a good title before commencing his action is considered to have been in the wrong at that critical period; and, though he may afterwards perfect his title and obtain specific performance, the Court will only grant him that indulgence upon the terms of his paying all the costs down to the time when a good title was first shown: *Abbott* v. *Sworder*, 4 De G. & S. 448, 459.

Exceptions to the general rule.

This is, no doubt, the general rule, and it has been stated that it should "be kept as strict as possible, and that there should be as few exceptions to it as possible:" *Wilkinson* v. *Hartley*, 15 Beav. 183, 188. But it frequently happens that the duty which the vendor has undertaken to perform in making out a good title is interrupted by some claim or demand on the part of the purchaser which cannot be sustained, and which gives rise to a suit. The consequence may be that something remains to be done which the vendor would have done without suit if an opportunity had been afforded him: per Lord Langdale, *Scoones* v. *Morrell*, 1 Beav. 251, 257.

In such a case the costs depend not upon the date at which a title was first shown, but upon the other circumstances of the case which raised the issue between the parties. See also *Long* v. *Collier*, 4 Russ. 267; *Monro* v. *Taylor*, 3 Mac. & G. 713; *Peers* v. *Sneyd*, 17 Beav. 151; *Phillipson* v. *Gibbon*, L. R. 6 Ch. 428, 434.

The rule has been expressed by Knight-Bruce, L. J., in the following terms:—"*Primâ facie* a vendor has to pay the costs to the time when a successful objection is first removed. But where it appears probable that the objection might have been removed if it had been made before the commencement of the suit, the Court does not throw, or does not always throw, the costs upon the vendor:" *Freer* v. *Hesse*, 4 De G. M. & G. 495, 505.

Purchaser ordered to pay costs "for the sake of the title."

When a purchaser's objections to title failed, it used to be said that for the sake of the title, to show that the Court entertained no doubt on the subject, he ought to pay the costs: *Hall* v. *May*, 3 K. & J. 585; *Osborne to Rowlett*, 13 Ch. D. 774, 798. But it seems that, where the objection raises an important and difficult question, the Court, in overruling it, will now make the

order without costs: *Cruikshank* v. *Duffin*, L. R. 13 Eq. 555; *Radford* v. *Willis*, L. R. 7 Ch. 7.

Dismissed with costs.

The vendor's action will be dismissed with costs if he has no title; or if there has been great delay, and there is little hope of perfecting the title within a reasonable time: *Fraser* v. *Wood*, 8 Beav. 339. See, however, *Omerod* v. *Hardman*, 5 Ves. 722, 737.

Decree with costs against vendor.

It is competent to the Court, in making a decree for specific performance at the suit of the vendor, to compel him to pay the costs of the action; as, for example, where the agreement stated in the bill differed from that proved by the plaintiff's witness, and the defendant set up a different agreement which the Court adopted: *Mortimer* v. *Orchard*, 2 Ves. jun. 243.

No costs.

In a case where the contract was not disputed, and the vendor at an early stage of the action declined the purchaser's offer of a common reference to chambers, and unsuccessfully set up the case that the title had been actually accepted, he was ordered to pay the costs of the hearing. No general costs of the action were given to either side, because the vendor failed to show a good title before action; but only by reason of a defect which had never been the subject of dispute, and was not, in fact, discovered until after the commencement of the action: *Phillipson* v. *Gibbon*, L. R. 6 Ch. 428.

Objection taken late.

Although the purchaser's objection to the vendor's title is allowed, yet if it was taken very late the action will be dismissed without costs: *Upperton* v. *Nickolson*, L. R. 6 Ch. 436.

Conduct of vendor not irreproachable.

If the conduct of the vendor has given the purchaser a probable ground for resisting the action, no costs will be given on either side: *Fenton* v. *Browne*, 14 Ves. 144.

Where a good title has been found by the certificate, the Court, in dismissing the action because it considers the title doubtful, will, it seems, do so without costs: *Willcox* v. *Bellaers*, T. & R. 491.

PURCHASER PLAINTIFF. Decree with costs.

The decree for specific performance, when made at the suit of the purchaser, will also in general be made with costs; and evidence adduced before the Chief Clerk in Chambers, or on an interlocutory application, is not admissible on further considera-

tion for the purpose of varying this rule: *Curling* v. *Austin*, 2 Dr. & Sm. 129; see *Collett* v. *Young*, 33 W. R. 543.

Dismissed with costs.

The rule that a vendor has to pay costs down to the time when a good title was first shown is subject to two exceptions when the action is brought by the purchaser, viz.: (1) where the successful objection was not raised until after action; (2) where the vendor did not comply with a requisition, merely because it was coupled with a claim, *e. g.* compensation, which could not be supported (*Lyle* v. *Yarborough*, John. 70), where the vendor, having been in no default, the plaintiff had to pay all the costs of the suit.

No costs.

Where the purchaser brings an action for specific performance, and it turns out that the vendor cannot make a good title, the action will be dismissed without costs: *Malden* v. *Fyson*, 9 Beav. 347. And also in cases where specific performance is refused on the ground of hardship to the defendant (the vendor) the order will be made without costs: *Wedgwood* v. *Adams*, 8 Beav. 103.

For various forms of order as to costs, any of which the judge in his discretion may adopt, see *Willmott* v. *Barber*, 17 Ch. D. 772.

Costs of reference.

The costs of the reference as to title are, in general, given to the vendor, if the inquiry is answered in his favour (*Abbott* v. *Sworder*, 4 De G. & S. 448, 460); and even where it was not found *when* the vendor first showed a good title, yet he was held entitled to include the costs of the reference in the general costs of the action: *Croome* v. *Lediard*, 2 Myl. & K. 293.

Where a purchaser (plaintiff) knowing of certain objections to the title insisted on a reference, and afterwards, upon the Master reporting against the title, waived the objections, he was, although his contention was correct, compelled to pay the costs of the reference: *Bennett* v. *Fowler*, 2 Beav. 302.

Costs due to changes before completion.

Where the vendor died before completion, the costs occasioned by the estate descending to an infant heir were not thrown exclusively upon the estate of the vendor, there being no default on either side: *Hanson* v. *Lake*, 2 Y. & C. C. 328; *Hinder* v. *Streeten*, 10 Hare, 18; but see *Midland Counties Ry. Co.* v. *Westcomb*, 11 Sim. 57.

But if the vendor after contracting to sell the land devised it to parties under disability, his estate was held liable to pay the costs which he had thus voluntarily rendered necessary to a completion of the contract: *Purser* v. *Darby*, 4 K. & J. 41. See *Wortham* v. *Lord Dacre*, 2 K. & J. 437; *Williams* v. *Glenton*, L. R. 1 Ch. 200; Conv. Act, 1881, s. 4. And see as to the costs of obtaining a vesting order, *Re Sparks* (6 Ch. D. 361), where it was held that there was no jurisdiction under the Trustee Acts, 1850 and 1852, to make a respondent pay the costs of the petition.

Vesting order.

Costs of an action for specific performance rest entirely, as already stated, in the discretion of the Court; but common law claims for damages are now so frequently united with this form of action, that it may be as well to recall the established principle laid down by Jessel, M. R., in *Cooper* v. *Whittingham* (15 Ch. D. 501), in the following words:—"When a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs:" p. 504. But if only nominal damages are recovered the plaintiff may not only be refused, but may be ordered to pay costs: *Harris* v. *Petherick*, 4 Q. B. D. 611. See also *Mitchell* v. *Darley Main Colliery Co.*, 10 Q. B. D. 457; *Upmann* v. *Forester*, 24 Ch. D. 231; *Jones* v. *Curling*, 13 Q. B. D. 262; *Wittman* v. *Oppenheim*, 27 Ch. D. 260.

Costs of an action to assert legal right.

Sect. 9.—*Summons under the Vendor and Purchaser Act.*

A convenient and expeditious method of determining many questions which formerly necessitated the institution of a suit, has been provided by the 9th section of the Vendor and Purchaser Act, 1874, which enacts that a vendor or purchaser of real or leasehold estate, or their representatives respectively, may at any time or times apply in a summary way to a judge

Vendor and Purchaser Act, s. 9.

Ch. XXVIII. s. 9.

in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

Originating summons.

The application is made by an originating summons entitled in the matter of the contract, and of the Act. For Form see Dan. Forms, 2315.

The Act was intended to enable the Court to decide in a summary way such questions as, whether a requisition has been sufficiently answered, whether a requisition is excluded by the conditions, and the like, but not to try disputed questions of fact: *Re Burroughs, Lynn and Sexton*, 5 Ch. D. 601. See *Re Popple and Barratt's Contract*, 25 W. R. 248; *Re Turner's Settled Estate*, 33 W. R. 265.

Evidence.

No evidence is admissible except such as would have been received upon a reference as to title under a decree where the contract was established: *Re Burroughs, Lynn and Sexton, supra.*

Statement of facts.

It is convenient, and not unusual, for a concise written statement of the circumstances of the case to be agreed upon, which is signed by the solicitors of the parties, and a copy of which is left at the chambers, either before or upon the return of the summons: Dan. Ch. Pr. 1382.

Service.

It has been decided in Ireland that service of the summons out of the jurisdiction may be allowed: *Drapers' Company* v. *M'Cann*, 1 L. R. Ir. 13.

Voluntary grants.

The section does not apply in cases of voluntary grant: *Re Marquis of Salisbury*, 23 W. R. 824.

Deposit and damages.

In one case, Hall, V.-C., while doubting the jurisdiction, ordered the vendor to repay the deposit, and to pay by way of damages to the purchaser his costs of investigating the title: *Re Higgins and Hitchman's Contract*, 21 Ch. D. 95, 99.

The nature of the questions which the Court will decide in this summary manner may be gathered from the following selection of cases under the Act:—

Compensation for misdescription: *Re Turner and Skelton*, 13 Ch. D. 130.

Conditions of sale, whether misleading: *Re Marsh and Earl Granville*, 24 Ch. D. 11; *Cumming to Godbolt*, 29 S. J. 27.

Consent,

Of Charity Commissioners: *Royal Society and Thompson, Re*, 17 Ch. D. 407; *Finnis to Forbes*, 24 Ch. D. 587, 591.

Of beneficiaries: *Re Neave's Trustees*, W. N. 1880, 141; *Re Earle and Webster's Contract*, 24 Ch. D. 144; *Re Tweedie and Miles*, 27 Ch. D. 315.

Conveyance,

Parties to: *Re Waddell's Contract*, 2 Ch. D. 172; *Re Metropolitan Bank and Jones*, 2 Ch. D. 366.

By trustees or beneficiaries: *Re Pigott and Great Western Rail. Co.*, 18 Ch. D. 146.

Purchaser's right to undertaking for safe custody of deeds: *Re Agg-Gardner*, 25 Ch. D. 600.

Notice of restrictive covenants in: *Re Monckton and Gilzean*, 27 Ch. D. 555.

Covenants for title in: *Re Sawyer and Baring's Contract*, 33 W. R. 26.

Estate tail, whether barred: *Re Dudson's Contract*, 8 Ch. D. 628.

Fraud upon a power: *Re Turner's Settled Estate*, 33 W. R. 265.

Incumbrances,

Receipt for legacy charged on property: *Re Coward and Adams' Purchase*, L. R. 20 Eq. 179.

Restrictive covenants: *Re Higgins and Hitchman's Contract*, 21 Ch. D. 95.

Interest, liability of purchaser to pay: *Re Pigott and Great Western Rail. Co.*, 18 Ch. D. 146.

Jurisdiction of the Court to make an order: *Re Hall Dare's Contract*, 21 Ch. D. 41.

Legal estate, whether outstanding: *Re Packman and Moss*, 1 Ch. D. 214; *Re Kearley and Clayton's Contract*, 7 Ch. D.

Ch. XXVIII. s. 9.

615; *Re Mercer and Moore*, 14 Ch. D. 287; *Davis to Jones and Evans*, 24 Ch. D. 190.

Limitations, Statute of: *Sands to Thompson*, 22 Ch. D. 614.

Malins' Act, land purchased in breach of trust not within: *Re Durrant and Stoner*, 18 Ch. D. 106.

Option of purchase: *Hallett to Martin*, 24 Ch. D. 624; *Re Adams and the Kensington Vestry*, 27 Ch. D. 394.

Power of sale,

Whether an administrator with the will annexed can exercise: *Re Clay and Tetley*, 16 Ch. D. 3.

Whether trustees have: *Re Cooke's Contract*, 4 Ch. D. 454; *Parish of Sutton to Church*, 26 Ch. D. 173; *Re McAuliffe and Balfour*, 50 L. T. 353; *Re Wright's Trustees and Marshall*, 28 Ch. D. 93.

Time when it may be exercised: *Re Cotton's Trustees and School Board for London*, 19 Ch. D. 624; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.

Purchase-money, receipt of, by vendors (trustees) in person: *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387.

Recitals, effect of: *Re Harman and Uxbridge Ry. Co.*, 24 Ch. D. 720.

Requisitions, whether sufficiently answered: *Re Burroughs, Lynn and Sexton*, 5 Ch. D. 601; *Hallett to Martin*, 24 Ch. D. 624.

Rescind, vendor's right to: *Re Jackson and Oakshott*, 14 Ch. D. 851; *Re G. N. Ry. Co. and Sanderson*, 25 Ch. D. 788; *Re Deptford Creek Bridge Co. and Beavan*, 27 S. J. 312; *Re Dames and Wood*, 27 Ch. D. 172; *Re Monckton and Gilzean*, 27 Ch. D. 555.

Root of title, whether a voluntary deed sufficient: *Re Marsh and Earl Granville*, 24 Ch. D. 11.

Stamps, whether sufficient: *Whiting to Loomes*, 17 Ch. D. 10.

Succession Duty, whether payable: *Re Cooper and Allen's Contract*, 4 Ch. D. 802; *Re Warner's Settled Estates*, 17 Ch. D. 711.

Superfluous land: *Re Met. Dist. Ry. Co. and Cosh*, 13 Ch. D. 607.

Trust for sale, persons to execute: *Osborne to Rowlett*, 13 Ch. D. 774; *Re Morton and Hallett*, 15 Ch. D. 143.

Trustees, whether well appointed: *Re Glenny and Hartley*, 25 Ch. D. 611.

Whether "trustees of the settlement" under the Settled Land Act: *Re Garnett Orme and Hargreave's Contract*, 25 Ch. D. 595.

Will, construction of: *Re Brown and Sibly*, 3 Ch. D. 156; *Re Coleman and Jarrom*, 4 Ch. D. 165; *Re White and Hindle's Contract*, 7 Ch. D. 201; *Re Methuen and Blore's Contract*, 16 Ch. D. 696; *Sturge and G. W. Ry. Co.*, 19 Ch. D. 444; *Re Portal and Lamb*, 27 Ch. D. 600.

Costs.

The costs of the summons and the adjournment into Court as a rule follow the event. Thus, where the purchaser's objection is allowed, the vendor, whether the summons has been taken out by him (*Re Packman and Moss*, 1 Ch. D. 214; *Re Clay and Tetley*, 16 Ch. D. 3; *Re Methuen and Blore's Contract*, 16 Ch. D. 696; *Hallett to Martin*, 16 Ch. D. 624, 633) or by the purchaser (*Re Mercer and Moore*, 14 Ch. D. 287, 296; *Re Higgins and Hitchman's Contract*, 21 Ch. D. 95), has to pay the costs.

Where, on the other hand, the title is declared good, the vendor's application is granted with costs: *Re Waddell's Contract*, 2 Ch. D. 172; *Re Cooke's Contract*, 4 Ch. D. 454; *Re Burroughs, Lynn and Sexton*, 5 Ch. D. 601; or, if the summons is taken out by the purchaser, it is dismissed with costs: *Re Ford and Hill*, 10 Ch. D. 365; *Re Turner and Skelton*, 13 Ch. D. 130; *Re Morton and Hallett*, 15 Ch. D. 143; *Re Warner's Settled Estates*, 17 Ch. D. 711; *Re Pigott and G. W. Ry. Co.*, 18 Ch. D. 146; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, 483; *Re Dames and Wood*, 27 Ch. D. 172.

No costs.

In some cases, however, no costs have been given: *Re Coward and Adams' Purchase*, L. R. 20 Eq. 179. This form of order was adopted when the judge considered that there was "a fair point for discussion" (*Re Met. Dist. Ry. Co. and Cosh*, 13 Ch. D. 607, 613), and where the difficulty arose entirely from conflicting decisions: *Osborne to Rowlett*, 13 Ch. D. 774, 798; and see *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387, 392.

Ch. XXVIII. s. 9.

In Court or in chambers.

The summons may be heard in chambers or it may be adjourned into Court. The latter course is usually adopted: *Re Coleman and Jarrom*, 4 Ch. D. 165, 168.

Appeal to judge in Court.

When the decision is taken in chambers, an appeal lies to the judge in Court by motion to discharge the order; see *Re Turner and Skelton*, 13 Ch. D. 130.

This appeal must be brought within twenty-one days from the time when the order was pronounced, whether it was simply a refusal or a substantive order: *Heatley* v. *Newton*, 19 Ch. D. 326, modified by R. S. C. 1883, Ord. LVIII. r. 15; see *Re Woodbridge*, 28 S. J. 720; *Re Hardwidge*, W. N. 1884, 204.

To Court of Appeal.

The aggrieved party may, within twenty-one days from the time when the order is pronounced, go direct to the Court of Appeal, as in *Re Durrant and Stoner*, 18 Ch. D. 106. But in such a case he must obtain leave from the judge, or a certificate that he does not desire to hear further argument; see *Re Elsom*, 6 Ch. D. 346; *Re Smith*, 9 P. D. 68.

From adjourned summons.

When the summons is adjourned into Court an appeal lies to the Court of Appeal, which must be brought within twenty-one days from the time at which the order is signed, entered, or otherwise perfected, or, in the case of a refusal of an application, from the date of such refusal: R. S. C. 1883, Ord. LVIII. r. 15; and see *Re Blyth and Young*, 13 Ch. D. 416.

Refusal of application.

For the purposes of calculating the time for appealing, an order which contains a declaration of rights, or an expression of the opinion of the judge, is not a simple refusal of the application: *Re Clay and Tetley*, 16 Ch. D. 3.

No action after summons.

After an order had been made in chambers under this section, it was held that an action for specific performance, or alternatively for damages, could not be maintained; the proper course being to apply in chambers to enforce the order already obtained: *Thompson* v. *Ringer*, 29 W. R. 520.

CHAPTER XXIX.

COMMON LAW REMEDIES OF VENDOR AND PURCHASER.

SECT.	PAGE
1. *Actions by the vendor*	492
i. *For the purchase-money*	492
ii. *For damages in respect of a breach of contract*	494
iii. *For use and occupation*	495
iv. *For the recovery of the title deeds*	495
2. *Actions by the purchaser*	496
i. *For the deposit*	496
ii. *For damages in respect of a breach of contract*	496
2. *Actions, &c.*—continued.	
iii. *For money had and received*	499
3. *The action of deceit*	500
4. *Action upon the covenants for title*	506
i. *When the only remedy*	506
ii. *Who entitled to sue*	507
iii. *What constitutes a breach*	508
iv. *Measure of damages*	513

Legal and equitable remedies.

THE distinction between legal and equitable remedies has not been abolished by the Judicature Acts; and, although all the Divisions of the High Court have now equal power and jurisdiction, it is still convenient to designate as "common law remedies" those which relate to legal rights, and which would formerly have been within the exclusive cognizance of the common law Courts.

Rights conferred by a breach of the contract.

When one party fails to carry out his part of a contract, the other may elect either to affirm or repudiate the contract; and in equity, and also at law, the form of the remedy depends on this election. In equity, if he affirms the contract he sues for specific performance, if he repudiates it, for rescission. These, on account of their importance, are the subjects of separate discussion (see Chaps. XXVIII. and XXX.). At common law one party may affirm the contract and sue for damages for its non-performance by the other; or, treating it as at an end, sue for any money paid in pursuance of the contract, as money had and received to his use.

Chap. XXIX.

Action of deceit.

In addition to the foregoing remedies for breach of the contract, an action of tort may, when the circumstances justify such a proceeding, be brought by either party against the other in respect of fraudulent misrepresentation. This, which is called an action of deceit, must also be briefly considered in the present chapter.

Sect. 1.—*Actions by the Vendor.*

Action for the purchase-money.

The vendor can bring an action of debt for the purchase-money, but he must have first performed his part of the agreement.

Dependent covenants.

"Where mutual covenants go to the whole of the consideration on both sides, they are conditions the one precedent to the other:" *Boone* v. *Eyre*, 1 H. Bl. 273 (a). See as to "dependent covenants," *Pordage* v. *Cole*, 1 Wms. Saund. 319 (l); *Cutter* v. *Powell*, 2 Smith's L. C. 1. The ordinary stipulations in an agreement for the sale and purchase of land belong to this class; and, accordingly, neither party can sue for breach of such an agreement unless he has "punctually, exactly and literally" completed his part: *Duke of St. Albans* v. *Shore*, 1 H. Bl. 270.

Plaintiff ready and willing to perform his part.

But where mutual acts are to be performed, the plaintiff may maintain his action for the non-performance by the other party if he shows that he was *ready* to do whatever was required to be done by himself: *Morton* v. *Lamb*, 7 T. R. 125; *Rawson* v. *Johnson*, 1 East, 203.

The plaintiff must aver his readiness and willingness to perform his part; and if, at the time of commencing his action he was not able (as, for example, in consequence of not having obtained the necessary licence to assign) to convey, his action must be dismissed: *Ellis* v. *Rogers*, 50 L. T. 660.

This case was reversed on appeal, and the Lords Justices intimated an opinion, though they did not decide the point, that the fact that the vendor had not obtained the lessor's licence to assign the lease at the time when the purchaser

repudiated the contract, would not have been a defence to the action: 29 S. J. 371. This was, however, an action for specific performance, and it is conceived that the above statement of the law as laid down by Kay, J., is correct so far as common law remedies are concerned.

An alternative claim for damages in an action for specific performance will, it seems, be construed as if it had been made under Lord Cairns' Act, and not as the assertion of the legal right; and, accordingly, if specific performance has been rendered impossible by the act of the plaintiff, he cannot recover damages: *Hipgrave* v. *Case*, 28 Ch. D. 356.

Conditions on the part of the vendor.

The chief things to be done by the vendor under an agreement for sale are (1) to show a good title, (2) to execute a conveyance.

Title.

As the showing of the title necessarily precedes the payment of the money, it seems that the vendor cannot recover the price unless he has actually shown a title, and that the mere averment that he was ready and willing to do so is not sufficient: *Phillips* v. *Fielding*, 2 H. Bl. 123; *Martin* v. *Smith*, 6 East, 555; *Thames Haven Dock Co.* v. *Brymer*, 5 Exch. 696.

Conveyance.

As to conveyance, however, the rule is different; for in general the payment and the conveyance are concurrent acts to be performed at the same time: *Goodisson* v. *Nunn*, 4 T. R. 761; *Glazebrook* v. *Woodrow*, 8 T. R. 366.

Discharge by the other party.

Where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part: *Jones* v. *Barkley*, 2 Dougl. 684; *Laird* v. *Pim*, 7 M. & W. 474. See *Poole* v. *Hill* (6 M. & W. 835), where an averment that the plaintiff was ready and willing to convey was held sufficient, on the ground that it was the duty of the purchaser to prepare the conveyance; see also *Manby* v. *Cremonini*, 6 Exch. 808; *Marsden* v. *Moore*, 4 H. & N. 500.

Sales under Lands Clauses Act.

The rule applies to sales under the Lands Clauses Consolidation Act; and the amount of compensation to be paid for land compulsorily taken, although it has been fixed by an award, is not recoverable until a conveyance of the land has been executed:

Guardians of East London Union v. *Metropolitan Ry. Co.*, L. R. 4 Ex. 309.

Nor does the amount of purchase and compensation money constitute a debt, which will support a winding-up petition, until the title has been investigated and accepted by the company: *Re Milford Docks Co.*, 23 Ch. D. 292. The taxed costs of an arbitration under the Act are, however, immediately payable, and the execution of a conveyance is not a condition precedent to their recovery: *Capell* v. *G. W. Ry. Co.*, 11 Q. B. D. 345.

Security for price.

If the purchaser gives a bill for the amount of the purchase-money, and enters into possession, it is no answer to an action on the bill to state that the vendor refused to execute a conveyance: *Moggridge* v. *Jones*, 14 East, 486; *Spiller* v. *Westlake*, 2 B. & Ad. 155.

Dependency of conditions a question of intention.

It is always a question of construction whether the stipulations are intended to be dependent or not; and if a day is fixed for the payment of the purchase-money, while the vendor is only to deduce a title within one month after demand, the deduction of a title is not a condition precedent to the right of action for the price: *Dicker* v. *Jackson*, 6 C. B. 103; see also *Mattock* v. *Kinglake*, 10 A. & E. 50; *Bankart* v. *Bowers*, L. R. 1 C. P. 484.

Whether the vendor can recover the whole price or only damages.

The plaintiff cannot have the land and its value too: per Parke, B., *Laird* v. *Pim*, 7 M. & W. 474, 478. In this case the defendants were in possession, and the reason alleged for limiting the damages to the actual injury sustained by the plaintiff, namely, that he might recover in ejectment immediately after that trial, no longer applies. Under the present practice it is submitted that the vendor could not recover the purchase-money without in effect submitting to an order for specific performance of the contract; nor could he, after receiving the purchase-money, recover possession of the land under his bare legal title.

Action for damages.

The appropriate remedy at common law for breach of contract was an action for damages. Contracts relating to land do not differ in this respect from contracts relating to chattels, and the right to bring such an action is not in any way restricted by recent legislation: *Noble* v. *Edwardes*, 5 Ch. D. 378.

Expenses recoverable.

Under ordinary circumstances, where the purchaser fails to complete, without any default on the part of the vendor, the latter is entitled to recover all the expenses he has incurred in preparing for the sale, and also the loss incurred upon a re-sale, that is, the difference of price, if any: per Brett, J., *Essex* v. *Daniell*, L. R. 10 C. P. 538, 553.

It is competent to the parties to assess the damages before breach, and the sum named is then recoverable as "liquidated damages." See *Wallis* v. *Smith*, 21 Ch. D. 243; and as to damages in case of re-sale, Chapter IV. Sales by Auction.

Forfeiture of deposit does not prevent action for damages.

A condition that, if the purchaser shall fail to comply with the stipulations of the contract, the deposit shall be forfeited as liquidated damages, does not preclude the vendor from suing for general damages, *ultra* the deposit, where the purchaser breaks off altogether: *Icely* v. *Grew*, 6 Nev. & M. 467.

Action for use and occupation.

When the purchaser, having paid the whole or part of his purchase-money, enters into possession of the premises under a contract of sale, which is not completed owing to a defect in the title, the vendor cannot recover rent as for use and occupation: *Kirtland* v. *Pounsett*, 2 Taunt. 145. See also *Hearn* v. *Tomlin*, Peake, N. P. C. 192; *Winterbottom* v. *Ingham*, 7 Q. B. 611. But he may be liable if he continues to occupy the premises after the contract has been rescinded: *Howard* v. *Shaw*, 8 M. & W. 118.

Action for the recovery of deeds.

An action lies for the recovery of the title deeds from the purchaser, if the latter refuses to carry out the contract; see *Parry* v. *Frame*, 2 Bos. & P. 451. In this case the Court expressed the opinion that although the defendant on payment of the purchase-money, and taking an assignment, would be entitled to retain possession of the indenture of lease, yet that the plaintiff had a right to insist on an assignment being made out with covenants to protect himself, and that, therefore, as the defendant had refused to accept an assignment or return the lease, the action of trover was maintainable.

Action of detinue by owner of part: Wright v. Rolleston: W.N. 84 p. 124.

Chap. XXIX. s. 2.

Sect. 2.—*Actions by the Purchaser.*

Actions for the deposit.

The circumstances under which a purchaser may recover his deposit have been already discussed: see Chap. IV. Sales by Auction. It is sufficient here to point out that, if the purchaser is entitled to rescind the contract, he will, also, as a general rule, be entitled to repayment of the deposit. For, the contract being at an end, the money received by the vendor from the purchaser in part performance of the contract is taken to have been "money had and received to the use" of the purchaser.

Actions for damages.

It has been already stated that, in an agreement for sale and purchase of land, the stipulations are, as a general rule, to be regarded as mutually dependent; *i. e.*, neither party can sue on the contract without having performed his own part of the agreement. The purchaser is, under this rule, bound to prepare and tender a conveyance, and pay the purchase-money, before bringing his action: *Baxter* v. *Lewis*, For. 61.

Lease to be prepared by landlord.

But where it was provided that the lease was to be drawn, prepared, and executed at the sole expense of the landlord, the lessee was held entitled to recover without averring that a lease was tendered to the lessor for execution: *Price* v. *Williams*, 1 M. & W. 6.

Resale.

So, also, a purchaser is not bound to tender a conveyance if the vendor has incapacitated himself from executing such a conveyance by selling the premises to another: *Knight* v. *Crockford*, 1 Esp. 190; *Lovelock* v. *Franklyn*, 8 Q. B. 371.

No damages for loss of bargain.

Upon a contract for the purchase of real estate, if the vendor, without fraud, is incapable of making a good title, the intended purchaser is not entitled to any compensation for the loss of his bargain. This is the rule established by *Flureau* v. *Thornhill*, 2 W. Bl. 1078, as stated by Lord Chelmsford: *Bain* v. *Fothergill*, L. R. 7 H. L. 158, 201.

An exception to the rule of common law.

It qualifies the rule of the common law that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed: per Parke, B., *Robinson* v. *Harman*, 1 Exch. 850, 855. See also *Locke* v. *Furze*, L. R. 1 C. P. 441.

Rests on the uncertainty of title to land.

The ground on which this qualification of the general rule rests is, that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and, taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title: per Lord Hatherley, *Bain* v. *Fothergill*, L. R. 7 H. L. 158, 210.

The rule in *Flureau* v. *Thornhill*, although doubted by Abbott, C. J., in *Hopkins* v. *Grazebrook*, 6 B. & C. 31, and by Cockburn, C. J., in *Engell* v. *Fitch*, L. R. 3 Q. B. 314, has been recognized as well founded in *Walker* v. *Moore*, 10 B. & C. 416; *Worthington* v. *Warrington*, 8 C. B. 134; *Pounsett* v. *Fuller*, 17 C. B. 660; *Sikes* v. *Wild*, 4 B. & S. 421; and may be regarded as finally established by the House of Lords in *Bain* v. *Fothergill*, *supra*.

Vendor aware of his want of title.

An exception to the rule in *Flureau* v. *Thornhill* was introduced by *Hopkins* v. *Grazebrook*, 6 B. & C. 31, which withdrew from the operation of the rule those cases in which a person enters into a contract for the sale of an estate, knowing at the time that he has no title to it. The effect of this exception was that, in an action for breach of contract for the sale of a real estate, if the vendor at the time of entering into the contract knew that he had no title, the purchaser had a right to recover damages for the loss of his bargain: per Lord Chelmsford, *Bain* v. *Fothergill*, *supra*, at p. 206.

The authority of *Hopkins* v. *Grazebrook* was repeatedly recognized (see *Robinson* v. *Harman*, 1 Exch. 850; *Pounsett* v. *Fuller*, 17 C. B. 660; *Engell* v. *Fitch*, L. R. 4 Q. B. 659); but it was expressly overruled by *Bain* v. *Fothergill*, *supra*, and the rule in *Flureau* v. *Thornhill* must now be treated as without exception; and accordingly damages beyond the actual expenses incurred by the purchaser cannot be recovered in an action for breach of contract, but must form the subject of an action for deceit: *Rock Portland Cement Co.* v. *Wilson*, 31 W. R. 193.

Wilful refusal to complete.

It is pointed out by Mr. Dart (V. & P. 955, 5th ed.) that the

Chap. XXIX. s. 2.

decision in *Bain* v. *Fothergill* applies merely to cases where the vendor is *bonâ fide* unable to give a title, and does not conflict with the only point which was really decided in *Engell* v. *Fitch*, viz., that a purchaser is entitled to substantial damages from a vendor who refuses, or wilfully neglects, to perform his part of the contract.

What damages purchaser may recover.

When the contract goes off through a defect of title, without any fraudulent misrepresentation, or wilful default on the part of the vendor, the purchaser can only recover by way of damages the expenses which have been properly incurred in relation to the contract. Thus he will be allowed the costs of preparing the conveyance, including counsel's fees: *Hodges* v. *Earl of Litchfield*, 1 Bing. N. C. 492, unless it was prepared prematurely; also the costs and expenses incurred in and about preparing, stamping and entering into the agreement for purchase: *Hanslip* v. *Padwick*, 5 Exch. 615; also the costs of investigating the title: *Walker* v. *Moore*, 10 B. & C. 416; *Hanslip* v. *Padwick*, *supra;* including the expenses of journeys for that purpose: *Hodges* v. *Earl of Litchfield*, *supra;* also the costs of searches for judgments: *Hodges* v. *Earl of Litchfield*, *supra*. Interest on the deposit, which had been retained for upwards of four years, was given by way of special damages in *Farquhar* v. *Farley*, 7 Taunt. 592. And see *Hodges* v. *Earl of Litchfield*, *supra*.

What expenses cannot be recovered.

But sums laid out by the purchaser after entering into possession of the premises in improvements cannot be recovered: *Worthington* v. *Warrington*, 8 C. B. 134.

So, the purchaser will not be allowed any expenses which he may have incurred in raising the purchase-money, or in the promotion and registration of a company formed for the purpose of carrying on business on the premises: *Hanslip* v. *Padwick*, 5 Exch. 615; or expenses incurred preliminary to the contract, or the costs of a survey of the property, or the costs of a suit for specific performance, over and above those allowed on taxation in the suit as between party and party: *Hodges* v. *Earl of Litchfield*, *supra;* or the costs of a suit for specific performance where the purchaser's bill had been dismissed without costs in consequence of the vendor's want of title: *Malden* v. *Fyson*, 11 Q. B. 292; or

the costs of an abortive sub-sale: *Walker* v. *Moore*, 10 B. & C. 416.

Money had and received.

If the contract is for any reason invalid, or if the purchaser elects, on the non-fulfilment of his part by the vendor, to repudiate the transaction, the legal rights of the purchaser are somewhat different from those which may be enforced by an action for damages. Treating the contract as at an end, there is no longer any right of action founded on the contract, but a right to recover any moneys which have been paid in pursuance of the contract as having been so paid without consideration. And courts of law have always ordered repayment in such cases in an action for money had and received to the use of the plaintiff. There is no right, however, to bring such an action after the conveyance has been executed; the remedy, if any, then being upon the covenants for title: *Clare* v. *Lamb*, L. R. 10 C. P. 334.

When purchaser can recover interest.

A purchaser who treats the contract as at an end, and brings an action to recover the deposit or any part of the purchase-money, can only recover interest from the time when demand of payment was made in writing with notice that interest would be claimed from the date of such demand until the term of payment: 3 & 4 Will. 4, c. 42, s. 28. For, unless the statute applies, in an action for money had and received only the net sum advanced without interest can be recovered: *Walker* v. *Constable*, 1 Bos. & P. 306; *Tappenden* v. *Randall*, 2 Bos. & P. 467; and see *Webster* v. *British Empire Assurance Co.*, 15 Ch. D. 169.

Invalid contract.

If there never was a binding contract the purchaser cannot, of course, recover damages for its breach. Thus, in a case where the requirements of the Statute of Frauds were not satisfied, it was held that the purchaser could only require the repayment of the deposit, but was not entitled to claim anything for interest, or for investigating the title: *Gosbell* v. *Archer*, 4 Nev. & M. 485.

Actions on special clauses.

Besides the actions which have been already mentioned, founded on the affirmance or repudiation of the contract as a whole, the special clauses of the agreement may give rise to rights of action if their provisions are not complied with. Thus,

Chap. XXIX. s. 2.

an action will lie for not delivering a proper abstract of title in accordance with the contract: *Sharland* v. *Leifchild*, 4 C. B. 529; or, for not granting an entrance to the premises in the manner agreed upon: *Wall* v. *City of London Real Property Co.*, L. R. 9 Q. B. 249; and some of the clauses of an agreement, *e. g.*, a clause providing that compensation shall be given (*Palmer* v. *Johnson*, 13 Q. B. D. 351) may continue operative after conveyance; see also *Joliffe* v. *Baker*, 11 Q. B. D. 255.

Sect. 3.—*The Action of Deceit.*

Foundation of action.

The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiff. Fraud without damage, or damage without fraud, gives no cause of action; but when these two concur, an action lies: per Buller, J., *Pasley* v. *Freeman*, 3 T. R. 51, 56.

Since the decision of this case, nearly 100 years ago, it has been considered settled law that an action on the case in the nature of an action of deceit might be brought in respect of a fraud whereby the plaintiff was damnified. It is essentially a common law action, and must be decided on the same principles whether it be brought in the Chancery or the Queen's Bench Division; see *Arkwright* v. *Newbold*, 17 Ch. D. 301, 320.

When it lies.

In some circumstances this action is the only available remedy for a purchaser of land. For, it may be, that a false statement has induced him to purchase, and that the falsehood has not been discovered until after the conveyance has been executed. In such a case he is, in the absence of special stipulation, without remedy *ex contractu*; see *Joliffe* v. *Baker*, 11 Q. B. D. 255; *Palmer* v. *Johnson*, 13 Q. B. D. 351; the covenants for title may not extend to the deficiency of which the purchaser complains; and the remedy by rescission of the contract may be barred by changes having taken place in the property, or in the situation of the parties; see *Rescission*, *post*, p. 531.

There remains, however, to the purchaser the right to complain of the fraud practised upon him, and, while he retains the property, to recover by way of damages the deficiency in its value.

Plaintiff must prove fraud.

The gist of the action is fraud, and it is necessary to prove that a statement has been made which, to the knowledge of the person making it, was false, or which was made by him with such recklessness as to make him liable just as if he knew it to be false, and that the plaintiff acted on that statement to his prejudice or damage: per Cotton, L. J., *Arkwright* v. *Newbold*, 17 Ch. D. 301, 320.

In a later case the same learned judge thus clearly explains the nature of the action. "This action, although brought in the Chancery Division, is a mere common law action of deceit. In order to entitle the plaintiff in such an action to relief, it must be shown, first, that representations, which in fact were not true, had been made by the defendants; that those representations were made by the defendants, either with a knowledge that they were not true, or recklessly, in which case, although they knew not of the untruth, they would be liable as if they had known that the statements were untrue. But that is not all. It must be shown also that the plaintiff was deceived, and induced by the deceit that was practised upon him to do something to his prejudice, in respect of which prejudice he claims damages": *Smith* v. *Chadwick*, 20 Ch. D. 27, 68; affirmed, D. P. 9 App. Cas. 187.

Fraud must be pleaded.

The cause of action being fraud, a case of fraudulent misrepresentation must be raised by the pleadings: *Redgrave* v. *Hurd*, 20 Ch. D. 1.

Verbal statements sufficient.

Verbal statements, although the contract is subsequently reduced into writing, are a sufficient foundation for the action: *Small* v. *Attwood*, You. 407, 460, and cases there cited.

Parties to the action.

The action may be brought by any person who has been damaged by the fraud of another. It is not necessary that a contract should have been entered into between the plaintiff and defendant, or even that the false statement should have been made directly to the plaintiff: *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244, 253; and see *ante*, p. 394.

So the defendant may be either the vendor, or the purchaser, or a trustee, an agent, or a stranger to the contract; see *ante*, p. 384.

Action fails if fraud not proved.

In order to maintain an action of deceit, there must be a wilful and fraudulent statement of that which is false: per James, L. J., *Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. D. 693, 711.

Thus, where brewers on a sale of a public-house overstated the profits which had been made, they were held, in a case at *Nisi Prius*, not liable to an action of deceit, inasmuch as they themselves might have been deceived by the occupier of the house: *Collins* v. *Gripper*, 1 F. & F. 332. See also *Haycraft* v. *Creasy*, 2 East, 92; *Moens* v. *Heyworth*, 10 M. & W. 147; *Taylor* v. *Ashton*, 11 M. & W. 401; *Ormrod* v. *Huth*, 14 M. & W. 651; *Schroeder* v. *Mendl*, 37 L. T. 452.

No action for concealment.

So, an action for deceit does not lie against the owner of a house, who knew it to be in a ruinous and unsafe condition, for not disclosing the fact to a proposed tenant: *Keates* v. *Cadogan*, 10 C. B. 591.

Mere non-disclosure of material facts is not a ground for such an action. There must be some active mis-statement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false: per Lord Cairns, *Peek* v. *Gurney*, L. R. 6 H. L. 377, 403.

To assert what is not known to be true is a fraud.

But, in the words of Lord Mansfield, C. J., "It is equally false for a man to undertake to say that which he knows nothing at all of, as to say *that* is true which he knows is not true:" *Pawson* v. *Watson*, 2 Cowp. 785, 788; and in another case he said, "It signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false:" *Schneider* v. *Heath*, 3 Camp. 506, 508.

An action of deceit may be brought in such cases because the representations are "fraudulent statements of that which is false" within the meaning of the rule as expressed by Lord Justice James in *Eaglesfield* v. *Marquis of Londonderry*, *supra*.

A man may issue a prospectus, or make any other statement

to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud: per Jessel, M. R., *Smith* v. *Chadwick*, 20 Ch. D. 27, 44.

This case was carried to the House of Lords, and the above statement of the law seems not to be consistent with the opinion expressed by the Earl of Selborne, L. C., that in an action of deceit it is the duty of the plaintiff to establish actual fraud: 9 App. Cas. 187, 190. See also the speech of Lord Blackburn at p. 201. It is conceived that the following passage from the judgment of Jessel, M. R., in the last-mentioned case places the matter on its right footing—"Again, in an action of deceit, even though the statement may be untrue, yet, if it was made in good faith, and the defendant had reasonable ground for believing it to be true, the defendant will succeed:" 20 Ch. D. 45. See also *Weir* v. *Bell*, 3 Ex. D. 238, 242; *Joliffe* v. *Baker*, 11 Q. B. D. 255, 269 *et seq.*

Motive immaterial.

The motive of the defendant for making the false statement is beside the question; and it is not necessary for the plaintiff to show that the falsehood was accompanied with an intention of injuring him: *Foster* v. *Charles*, 7 Bing. 105; nay, the defendant would be liable even if he honestly believed that the transaction was advantageous, and that he was doing the plaintiff a kindness by tricking him into it: per Lord Blackburn, *Smith* v. *Chadwick*, 9 App. Cas. 201.

Reckless statements.

The plaintiff, in an action of deceit, must allege and prove fraud, *i. e.* that the statement relied upon was false, and false to the knowledge of the defendant, or else that it was made so recklessly as to amount to a lie. But, in addition to this, he must allege and prove damage as the consequence of the fraud. This he will succeed in doing if he shows that the representation was material, and that he was induced thereby to enter into the contract: see *Smith* v. *Chadwick*, 20 Ch. D. 27, 68. As to what representations are material, see *ante*, p. 396 *et seq.* It is

Chap. XXIX. s. 3.

sufficient to recapitulate what was there stated, namely, that the representations must relate to existing facts, and not merely to matters of law, belief, opinion, or intention; and that it is a question for the judge, and not for the jury, whether a document contains such statements as from their nature would be insufficient to sustain the action: *Bellairs* v. *Tucker*, 13 Q. B. D. 562, 574.

Burthen of proof.

The burthen of proof rests on the plaintiff, both as to the fraud of the defendant and as to his own conduct in entering into the contract being influenced by the false statement: *Smith* v. *Chadwick*, 7 App. Cas. 187, 190, 195. But if it is proved that the defendant, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of *fact* that he was induced to do so by the statement: per Lord Blackburn, *Smith* v. *Chadwick*, 9 App. Cas. 196. The question, therefore, as to the effect of the statement upon the plaintiff's conduct is for the jury, and is not an inference of law, or a proper subject for a direction by the judge, as seems to have been asserted by Jessel, M. R., in *Redgrave* v. *Hurd*, 20 Ch. D. 21; see also his remarks in *Smith* v. *Chadwick*, 20 Ch. D. 44.

What is a good defence.

The defendant will succeed if he can show—(1) that the statement made by him was true in fact, or that he made it *bonâ fide* believing it to be true; or (2) that it was not material; or (3) that, even when a false and fraudulent statement has been made, the plaintiff did not rely upon the statement. This last condition may be satisfied either by showing that the plaintiff knew the truth before he entered into the contract, or else by showing that he avowedly did not rely upon the misstatements: per Jessel, M. R., *Smith* v. *Chadwick*, 20 Ch. D. 44; and see cases cited *ante*, p. 406. But when a man has made a false representation, the burthen lies upon him of showing that the party to whom it was made was not in reality misled by it. And this burthen he will not discharge by proving that the plaintiff was guilty of negligence (see *Reynell* v. *Sprye*, 1 De G. M. & G. 660, 710), or that the other party had the means of knowledge within his reach (*Dobell* v. *Stevens*, 3 B. & C. 623;

Means of knowledge.

Harris v. *Kemble*, 5 Bli. N. S. 730; *Rawlins* v. *Wickham*, 3 De G. & J. 304; *Ferrier* v. *Peacock*, 2 F. & F. 717; *Central Ry. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99); or that he made inquiry, unless he thereby discovered the truth, as by a partial examination of the books (*Harris* v. *Kemble*, 1 Sim. 111; 5 Bli. N. S. 730), or a cursory inspection of the premises (*Grant* v. *Munt*, Coop. 173; *Higgins* v. *Samels*, 2 J. & H. 460; see *Denny* v. *Hancock*, L. R. 6 Ch. 1).

Actual inquiry.

The right to bring an action of deceit, being a legal right, cannot be barred by any delay short of the period of limitation: *Peek* v. *Gurney*, L. R. 6 H. L. 377, 384; *Fullwood* v. *Fullwood*, 9 Ch. D. 176. See also per Thesiger, L. J., in *De Bussche* v. *Alt*, 8 Ch. D. 286, at p. 314; *Gibbs* v. *Guild*, 9 Q. B. D. 59.

Time for action of deceit.

It seems that the maxim "*actio personalis moritur cum personâ*," applies to actions of deceit, except in two cases.

Actio personalis moritur cum personâ.

1. When the person defrauded dies, his executor or administrator may maintain an action for any wrong whereby the personal estate of the testator has been injured: *Twycross* v. *Grant*, 4 C. P. D. 40. An action would thus lie for a misrepresentation on the sale of an estate if the purchaser was induced thereby to give a larger price for the property than he otherwise would have given.

2. When the person who has committed the fraud dies, the right of action against him will survive as against his representatives where his estate has profited by the tort: *Phillips* v. *Homfray*, 24 Ch. D. 439. See *Ingram* v. *Thorp*, 7 Hare, 67.

If his estate has not derived profit from the misrepresentation no action can be brought. There is no case in which, upon a claim against a testator *ex delicto*, his executors have been held liable to answer for it in damages: *Peek* v. *Gurney*, L. R. 6 H. L. 377, 395.

An action would, on this principle, lie against the executors of a vendor who by misrepresentation had obtained too large a price for his estate; but not against a third person who had made false statements on the occasion of the sale: *Young* v. *Wallingford*, 31 W. R. 838.

Even when the estate of the wrong-doer has derived no advantage from the tort, his executors or administrators may be

sued in certain cases, provided the injury complained of has been committed not more than six months before the death of the testator or intestate; see *Kirk* v. *Todd*, 21 Ch. D. 484; *Chapman* v. *Day*, 31 W. R. 767; R. S. C. 1883, Ord. XVII.

Sect. 4.—*Action upon the Covenants for Title.*

Action on the covenants the only remedy in some cases.

In the absence of fraud the only remedy of the purchaser, who is evicted after completion of the contract, is an action for breach of the covenants in his conveyance: *Bree* v. *Holbech*, Dougl. 654.

But this rule holds only when the purchase has been *completed;* and, accordingly, if the conveyance has not been executed by all proper parties the purchase-money may, where the purchaser is evicted, be recovered as money paid under a mistake: *Johnson* v. *Johnson*, 3 Bos. & P. 162.

In this case Lord Alvanley, C. J., in delivering the judgment of the Court, said:—We by no means wish to be understood to intimate that where under a contract of sale a vendor does legally convey all the title which is in him, and that turns out to be defective, the purchaser can sue the vendor for money had and received. Every purchaser may protect his purchase by proper covenants. Where the vendor's title is actually conveyed to the purchaser the rule of *caveat emptor* applies: p. 170. See also *Cripps* v. *Reade*, 6 T. R. 606; *Clare* v. *Lamb*, L. R. 10 C. P. 334.

No remedy in equity after conveyance.

Nor was relief to be obtained in equity any more than at law: *Wakeman* v. *Duchess of Rutland*, 3 Ves. 233, 235. See *Serjeant Maynard's Case*, 2 Freem. 1; 3 Swanst. 651; *Thomas* v. *Powell*, 2 Cox, 394; *McCulloch* v. *Gregory*, 1 K. & J. 286.

Nor compensation for defect of title.

Although, as has been already stated (*ante*, p. 355), a purchaser does not lose his right to compensation for misdescription, under an express provision for that purpose in the agreement, by merely taking a conveyance: *Palmer* v. *Johnson*, 13 Q. B. D.

351; yet the ordinary form of such a provision does not apply to a defect of title. Accordingly, where the trustee in bankruptcy of the vendor completed the contract, and the purchase-money was distributed among the creditors, on its being subsequently discovered that the bankrupt was tenant for life only, and not seised in fee, as had been supposed, it was held that the purchaser, notwithstanding a condition for compensation, had no claim upon the bankrupt's estate in respect of the difference of value; but that his remedy, if there had been no bankruptcy, would have been only upon the vendor's covenants for title. The trustee in bankruptcy, of course, had given no covenants: *Ex parte Riches*, 27 Sol. Journ. 313.

Estoppel.

The covenants for title in a mortgage deed do not amount to a sufficiently precise averment that the mortgagor is seised of the legal estate as to create an estoppel as against persons claiming under him for valuable consideration: *General Finance Co.* v. *Liberator Permanent Benefit Building Society*, 10 Ch. D. 15.

Who may be sued.

The burthen of covenants for title rests on the covenantor and his representatives. They give rise to a merely personal obligation, and are never binding on persons as assignees of any particular estate: Third Report of the Real Property Commissioners, p. 52; quoted 1 Dav. 137.

The covenantor or his representatives may therefore be sued on the covenants, quite irrespectively of the number of persons through whose hands the estate may, in the meantime, have passed.

Who may sue.

The covenants for title in general run with the land; and successive assignees become entitled to their benefit, whether "assigns" are named in the covenants or not; see Sug. V. & P. 577. For this purpose, however, it was necessary that there should be "privity of estate" between the covenantee and the assignee. In other words, the estate taken by the assignee must have been derived from that of the original covenantee. This condition was of course satisfied in the case of successive conveyances in fee; and also, it seems, where the conveyance was such as to transfer a seisin to serve the uses declared. For in the latter case the Statute of Uses transferred the seisin to the several parties who from time to time became entitled under

the uses, and the benefit of the covenants being annexed to the seisin was perpetually transferred with it: Third Report of the Real Property Commissioners, *supra*.

No privity of estate, no action.

If, however, the estate taken is not served by the original seisin, there ceases to be any "privity of estate." The following example is given by Lord St. Leonards: "If under a power of appointment in A. a new power of appointment be created in B., with whom A. covenants for title in the usual way, and B. afterwards executes his power in favour of C., the covenants will not run with the land in his hands." V. & P. 580.

Benefit of the covenants.

The Real Property Commissioners, in their Third Report, recommended "that in all cases the benefit of covenants entered into with the owners of land, and relating to the same land, shall run with the land for the benefit of every person taking the land, or any partial estate or interest in it, either under the covenantee, or under any act of the covenantee, or under any assurance by, through, or under which the covenantee may claim, notwithstanding any want of privity of estate with the covenantee, and whether the title of such person arises by way of transfer of seisin, or by way of use, or under the exercise of a power, or otherwise, and whether the covenantor had or had not any previous estate or interest in the land": see 1 Dav. p. 138.

This recommendation seems to have been carried out as to the covenants for title implied under the 7th section of the Conveyancing Act, 1881, for it is thereby enacted that "the benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested": sect. 7 (6). But it does not seem clear that the covenants would, under this clause, run with the land where the estate is dealt with by successive appointments, as in the case above cited from Sugden's V. & P. The point, however, although of theoretical interest, is very unlikely to arise in practice.

What constitutes a breach.

The next thing to be considered is, whether the act whereby the purchaser is prejudiced is a breach of the covenants or any

of them. This depends partly on the nature of the disturbance and partly on the form of the covenant; for it must be remembered that, both under the statute and in ordinary practice, the covenant is absolute in the case of a mortgagor, but in the case of an ordinary vendor, limited to his own acts and defaults, and those of persons through whom he derives title otherwise than by purchase for value: Conv. Act, 1881, s. 7 (A).

Usual covenants.

The usual vendor's covenants are—(1) that he has good right to convey; (2) for quiet enjoyment; (3) free from incumbrances; (4) for further assurance and, where leaseholds are conveyed, (5) that the lease is valid.

The first and fifth of these covenants are broken, if at all, at the instant of conveyance (see *Spoor* v. *Green*, L. R. 9 Ex. 99); but the second and third not until disturbance, and the fourth not until refusal by the vendor to comply with the purchaser's request. This is important, having regard to the period of limitation within which the purchaser must bring his action.

1. Of covenant for good right to convey.

An unqualified covenant by the vendor that he has good right to convey, amounts to an absolute warranty of title; but limited, as the covenant usually is, to the acts and defaults of the covenantor and those claiming under him, it does not give the purchaser any protection against defects of the title prior to the conveyance.

Freehold and copyhold.

Thus an unqualified covenant that the vendor had good right to convey in manner aforesaid, following a conveyance unto and to the use of the purchaser and his heirs, would be equivalent to the old covenant that he was seised in fee simple. This has been held to be broken if the land was copyhold, and to confer a right to damages "according to that rate that the country values fee simple land more than copyhold land:" *Gray* v. *Briscoe*, Noy, 142; conf. *Hart* v. *Swaine*, 7 Ch. D. 42.

Qualified covenant.

A vendor who has no title at all to the property conveyed, is not liable under the usual qualified covenant. And, *à fortiori*, he is not liable for a defect of title not attributable to his own acts. Thus, where a vendor had built so as to encroach on his neighbour's land in such a manner that he would with time have acquired an easement over it, and before the sale had given an acknowledgment of such encroachment, he was held

Chap. XXIX. s. 4.

not to be liable for a breach of covenant for title limited to his own acts, &c. and those of persons claiming under him: *Thackeray* v. *Wood*, 6 B. & S. 766.

A covenant by a vendor that he, with the concurrence of other persons, has good right to convey seems to be broken if one of such persons is personally incompetent to convey; see *Nash* v. *Aston*, Sir T. Jones, 195.

Tortious eviction.

Whether the covenants are absolute or limited, they do not extend to the acts of wrong-doers, but only to persons claiming by a legal title: *Dudley* v. *Folliott*, 3 T. R. 584; *Spoor* v. *Green*, L. R. 9 Ex. 99.

So, in the case of a lease, "if the lessee be by express covenant to enjoy his term (or enjoy it against all men, which is the the same), he shall not have an action of covenant against the lessor, unless he be legally ousted or evicted; for, if he be ousted tortiously by any stranger, he hath his remedy:" per Curiam, *Hayes* v. *Bickerstaff*, Vaugh. 118. See also *Jerritt* v. *Weare*, 3 Pri. 575, 604; *Rolph* v. *Crouch*, L. R. 3 Ex. 44.

Eviction by title paramount.

When the covenants are limited to the acts and defaults of the covenantor, eviction by a paramount title is not a breach of the covenant. But if a tenant in tail grants a lease beyond his statutory powers, not barring the entail may be a "default" within the meaning of the covenant for quiet enjoyment: *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 544, 561, as explained by Lord St. Leonards, V. & P. 603.

When action may be brought.

An action for breach of the covenant for good right to convey may be brought before eviction: *Kingdon* v. *Nottle*, 4 M. & S. 53.

2. Of covenant for quiet enjoyment.

The covenant for quiet enjoyment is a continuing covenant, and is broken only by an actual disturbance of the covenantee's possession or enjoyment. Moreover, it is not broken by a tortious eviction: *Hayes* v. *Bickerstaff*, Vaugh. 118; and see Platt on Covenants, 313, and cases there cited.

Action by lessor.

An action against a lessee for waste is not a breach of such a covenant, for it does not relate to title or possession: *Morgan* v. *Hunt*, 2 Vent. 213.

Obstruction of way.

The obstruction of a way of necessity is a breach of the covenant: *Morris* v. *Edgington*, 3 Taunt. 24; and see *Andrews* v. *Paradise*, 8 Mod. 318.

"A proceeding of any Court, interfering with the title and possession of land, does amount to a breach of the covenant for quiet enjoyment; as in case of dower, common, rent, or such like: *Calthorp* v. *Heyton*, 2 Mod. 54; *Hunt* v. *Danvers*, T. Raym. 370. On the other hand, it has long been settled that such a proceeding, interfering only with a particular mode of enjoyment of the land, or part of it, but not with the title or possession, is not a breach; *Morgan* v. *Hunt*, 2 Vent. 213:" per Willes, J., *Dennett* v. *Atherton*, L. R. 7 Q. B. 316, 326.

Title and possession.

Mode of enjoyment.

In this case land had been conveyed to a lessor in fee, subject, however, to a restrictive covenant against carrying on the trade of a seller of beer. A lease was subsequently granted to the plaintiff, in which a covenant was contained against carrying on certain trades, but no mention was made of a seller of beer. The plaintiff having opened a beer-house was restrained by injunction, and thereupon sought damages against his lessor for breach of the covenant for quiet enjoyment. But it was held that he had no remedy as the injunction only interfered with a particular user of the lands. See also *Spencer* v. *Marriott*, 2 D. & R. 665; *Child* v. *Stenning*, 11 Ch. D. 82.

Restrictive covenants.

A decree declaring that land is subject to a right of common is not a breach of the covenant for quiet enjoyment where there is no interference with the plaintiff's actual enjoyment of his land. Nor, it seems, is such a decree a breach of the covenant for title, when the land was unenclosed at the date of the covenant, and then subject, for anything that appeared to the contrary, to the exercise of the right: *Howard* v. *Maitland*, 11 Q. B. D. 695.

Decree declaring right of common.

The bursting of a water-pipe supplying a cistern at the top of a house, whereby injury was caused to the goods of a tenant of the ground floor is not, in the absence of negligence on the part of the landlord, a breach of a covenant for quiet enjoyment: *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602; see *Shaw* v. *Stenton*, 2 H. & N. 858.

Bursting of water-pipe.

It is in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is sub-

Quiet enjoyment a question of fact.

Chap. XXIX. s. 4.

stantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to be broken, although neither the title to the land nor the possession of the land may be otherwise affected: per Fry, L. J., *Sanderson* v. *Mayor of Berwick-upon-Tweed*, 13 Q. B. D. 547, 551.

Determination of lessor's interest.

Where a lessee underlet the premises by mistake for a longer term than he himself held, and entered into the usual covenants for title, it was held that a notice by him to terminate the underlease given in consequence of the claim by the superior landlord, was not a breach of the covenants: *Besley* v. *Besley*, 9 Ch. D. 103.

Does not enlarge the rights of the grantee.

It is not the object or effect of a covenant for quiet enjoyment to enlarge the rights of the grantee or to increase the liabilities of the grantor: per James, L. J., *Leech* v. *Schweder*, L. R. 9 Ch. 463, 477. Accordingly, where there is a "disposition by the owner of two tenements," containing a covenant for quiet enjoyment, the right to existing lights conferred by the grant is not enlarged by the covenant, so as to entitle the grantee to an injunction, independently of the quantum of interference: *ibid.* See also *Potts* v. *Smith*, L. R. 6 Eq. 311; *Booth* v. *Alcock*, L. R. 8 Ch. 663.

Qualification of subsequent covenants.

The covenant for quiet enjoyment implied under the Conveyancing Act (sect. 7, Forms A and B), is subject, by virtue of the connecting words, "notwithstanding anything as aforesaid," to the same qualification as the implied covenant for good right to convey. But where the covenants are expressed at length, in the absence of some such words, indicating an intention to make the subsequent covenants dependent upon the introductory limitation of the covenantor's liability, they will be read as absolute and unqualified covenants on his part; see *Henty* v. *Wrey*, 19 Ch. D. 492; 21 Ch. D. 332.

3. Of covenant against incumbrances.

The ordinary vendor's covenant against incumbrances is that the land conveyed shall be enjoyed free from incumbrances. The difference should be observed between the form of this covenant and that of the usual covenant by trustees that they have not incumbered. In the former case, there is no breach of the covenant until disturbance of the purchaser by the

incumbrancer, in the latter, the covenant is broken, if at all, at the moment of conveyance; see *Vane* v. *Lord Barnard*, Gilb. 6.

A breach of the ordinary vendor's covenant is, accordingly, also a breach of the covenant for quiet enjoyment; and seems to be also covered by the covenant for further assurance: *King* v. *Jones*, 5 Taunt. 418, 427.

4. Of covenant for further assurance.

The covenant for further assurance is broken when the vendor refuses to do any reasonable and necessary act: *King* v. *Jones*, 5 Taunt. 418.

But a refusal to do something which, if done, would be useless and ineffectual, is not a breach of the covenant for further assurance: *Warn* v. *Bickford*, 9 Pri. 43; nor when the refusal is caused by the act of God: *Nash* v. *Aston*, Sir T. Jones, 195.

Covenant for production.

It seems to be unsettled whether under this covenant a purchaser can call for a covenant for production of title deeds; see *Hallett* v. *Middleton*, 1 Russ. 243; *Fain* v. *Ayers*, 2 Sim. & St. 533.

Further assurance of interests fairly acquired.

The covenant for further assurance confers on the purchaser only the right to call on the vendor to convey what he may have acquired by fair and honest means: *Heath* v. *Crealock*, L. R. 10 Ch. 22, 31.

Specific performance.

In addition to the remedy by an action for breach of covenant, the purchaser may obtain specific performance of a covenant for further assurance; see Platt on Covenants, 353. But, it seems, that if no damages could be recovered for the breach, the covenant will not be specifically performed: *Davis* v. *Tollemache*, 2 Jur. N. S. 1181.

Measure of damages.

Where there is a breach of the covenant for quiet enjoyment, the plaintiff is entitled to recover the value of the land, and not merely the price which he paid for it: *Jenkins* v. *Jones*, 9 Q. B. D. 128. But where there is no actual eviction he can only recover such damages as he can prove that he has incurred up to the date of the issuing of the writ: *Child* v. *Stenning*, 11 Ch. D. 82; see now R. S. C., Ord. XXXVI. r. 58.

Costs of defending action.

Where an action of trespass was brought against a lessee by a person claiming under the landlord, the lessee was held entitled to recover from the landlord the costs and damages which

he had paid to the plaintiff in the action of trespass, and also his own costs of defending the action: *Rolph* v. *Crouch*, L. R. 3 Ex. 44.

Void lease.

As to the measure of damages when a lease, purported to be granted by a tenant for life, proves to be void, see *Williams* v. *Burrell*, 1 C. B. 402; *Lock* v. *Furze*, L. R. 1 C. P. 441.

Express notice of incumbrances.

It has been doubted whether a covenant against incumbrances would extend to protect a purchaser against incumbrances of which he had express notice: *Ogilvie* v. *Foljambe*, 3 Mer. 53. And it has been stated that the covenant for quiet enjoyment can only extend to incumbrances and defects in the title of the covenantor of which the purchaser had no notice: per Malins, V.-C., *Hunt* v. *White*, 16 W. R. 478.

Where a lessor purported to grant a lease of premises, to part of which he knew that he had no title, it was held that the lessee was not bound to enter in order to see whether he would be evicted; but that he might repudiate such part of the demised premises as the lessor had no power to grant, and keep the remainder; and further, that the lessee, in an action by the lessor for rent, might counterclaim for the breach of the implied covenant for title: *Mostyn* v. *West Mostyn Coal and Iron Co.*, 1 C. P. D. 145; see *Stranks* v. *St. John*, L. R. 2 C. P. 376.

Action by representatives of covenantee.

Although the breach of the covenants for title was committed during the life of the ancestor or testator, yet, if the ultimate damage (*i. e.*, the eviction) accrued after his death, the heir or devisee, as the case may be, may maintain an action: *King* v. *Jones*, 5 Taunt. 418. And an executor cannot recover, even for a breach in the lifetime of his testator, without showing some special damage to the testator during his lifetime: *Kingdon* v. *Nottle*, 1 M. & S. 355.

CHAPTER XXX.

RESCISSION OF THE CONTRACT.

SECT.		PAGE
1.	*While it continues executory*	515
i.	*Rescission under a clause in the agreement*	516
ii.	*Rescission by subsequent agreement*	517
iii.	*Rescission by one party*	518
	(a) *For fraud*	519
	(b) *For mistake*	520
	(c) *For default of the other party*	521
iv.	*How the right to rescind may be lost*	524
2.	*After it has been carried into execution*	527
i.	*For fraud or mistake*	527
ii.	*Action of deceit compared with rescission*	529
iii.	*Contract induced by fraud voidable not void*	530
iv.	*Restitutio in integrum*	531
v.	*Right to rescind barred by delay*	535

SECT. 1.—*While it continues executory.*

Executed and executory contracts.

A BROAD distinction exists between those cases in which a person seeks to set aside a contract while it remains *in fieri*, and those in which relief is sought after the contract has been executed by conveyance and payment of the purchase-money.

Conveyance not necessary to make a contract "executed."

A contract may, indeed, be to a great extent executed, although a conveyance has not been signed. The formalities of parchment and sealing wax count for something, but the substantial alteration in the positions of the parties effected by payment of the consideration and delivery of possession is what really marks the difference between executory and executed contracts. Thus, in the great case of *Attwood* v. *Small* (6 Cl. & Fin. 232), no conveyance had been executed, but the purchasers had for six months been in possession of the mines, and the purchase-money had been set apart. It was accordingly treated as an executed contract, and has always been regarded as the leading authority upon that branch of the subject. In the great

Chap. XXX. s. 1.

majority of cases, however, the execution of the conveyance, the payment of the purchase-money, and the delivery of possession, are contemporaneous acts.

Executed contract, as a rule, only rescinded for fraud.

In the absence of fraud, an executed contract is, as a general rule, regarded as unimpeachable; although, as will be seen from sect. 2, *post*, p. 528, the sale may, in some circumstances, be set aside after conveyance without actual fraud.

Executory contract, how rescinded.

An executory contract may be rescinded in three ways:—(1) by virtue of a clause in the original agreement; (2) by the subsequent agreement of the parties; and (3) by one party against the wish of the other, where the latter is in default.

Power to rescind under clause in agreement.

It is a very usual provision, both in conditions of sale and private contracts, that if the purchaser shall insist on any objection or requisition which the vendor shall be unable or unwilling to remove or comply with, the vendor may by notice annul the sale, and return the deposit without interest, costs of investigating the title or other compensation; see 1 Dav. Conv. 614.

The cases in which the vendor can rescind under this condition have already been fully considered, see CONDITIONS OF SALE, *ante*, p. 77.

For the present purpose it is sufficient to state, that the clause confers a power upon the vendor in derogation of the purchaser's ordinary rights, and receives, therefore, a somewhat strict construction; see *Hardman* v. *Child*, 28 Ch. D. 712.

Rescission by vendor on non-payment of instalment.

Time may by agreement be made of the essence of the contract, as to the payment of the instalments of the purchase-money, and in default of payment power may be reserved to the vendor to rescind. In such a case every default of the purchaser is a new breach, and gives the vendor a right to rescind, which, however, must be immediately asserted, and will be held to have been waived, if a subsequent instalment is received: *Hunter* v. *Daniel*, 4 Hare, 420.

"Void" construed "voidable at the option of one party."

A proviso in a lease, that it shall be void if the tenant fails to perform certain conditions, is construed to mean "voidable at the option of the lessor": *Doe* v. *Bancks*, 4 B. & Ald. 401; *Arnsby* v. *Woodward*, 6 B. & C. 519; *Doe* v. *Birch*, 1 M. & W. 402.

And, by analogy to these cases, a condition in an agreement

for sale that, in case the vendor cannot deduce a good title, or the purchaser shall not pay the purchase-money on the appointed day, the agreement shall be utterly void, has been held to have a similarly restricted signification. "The meaning is," said Mansfield, C. J., "that if the seller cannot make a good title by the time mentioned, the contract shall be void as against him, and the plaintiff has a right to be off his bargain. So *è contra*, if the plaintiff does not pay the money, the defendant may avoid the contract; but the plaintiff cannot say, I am not ready with my money, therefore I will avoid the contract; nor can the seller say, my title is not good, therefore I shall be off": *Roberts* v. *Wyatt*, 2 Taunt. 268, 277.

It is contrary to justice that a man should avoid his own contract by his own wrong; and the Court will not adopt, unless constrained to do so, a construction which would have that effect: *Malins* v. *Freeman*, 4 Bing. N. C. 395; and see *Davenport* v. *The Queen*, 3 App. Cas. 115.

Power reserved to purchaser to rescind.

The agreement may also confer upon the purchaser the power of rescinding the contract; as where it was provided that, if the counsel of the purchaser should be of opinion that a marketable title could not be made by the time appointed for completion, the agreement should be void: *Williams* v. *Edwards*, 2 Sim. 78; *Hudson* v. *Buck*, 7 Ch. D. 683.

But it requires very clear words to confer upon a stranger an arbitrary power of rejecting the title. Thus, where the agreement was "subject to the title being approved by our solicitor," Earl Cairns, L. C., said "that he was disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation; as meaning, in fact, that the title must be investigated and approved in the usual way, which would be by the solicitor of the purchaser": *Hussey* v. *Horne-Payne*, 4 App. Cas. 311, 322.

Rescission by subsequent agreement.

The contract may be effectually rescinded by the agreement of the parties that it shall be at an end; and it is well settled that, notwithstanding the Statute of Frauds, an agreement in writing for the sale of lands may be discharged by parol; see *ante*, p. 427.

Chap. XXX. s. 1.

This new contract to abandon the old one may be established in the following ways:—

How agreement to rescind proved.

(1) Where there is an express agreement to put an end to the transaction: *Smith* v. *Field*, 5 T. R. 402.

(2) Where circumstances exist from which an abandonment will be implied: *Lloyd* v. *Collett*, 4 Bro. C. C. 469; *Rosse* v. *Sterling*, 4 Dow, 442; *Carter* v. *Dean of Ely*, 7 Sim. 211.

Or (3) where there is a new agreement inconsistent with, and, therefore, virtually rescinding, that which had been previously in force: *Moore* v. *Marrable*, L. R. 1 Ch. 217. But an invalid agreement will not effect an implied rescission: *Noble* v. *Ward*, L. R. 2 Ex. 135.

Laches which are not sufficient to imply a total abandonment of the contract, may yet preclude the party from seeking specific performance; see *ante*, p. 461.

Rescission *in invitum*.

The cases of rescission which most frequently arise for the consideration of the Courts are those in which one party wishes to rescind, and the other to carry out the contract. And it may be observed that, under the usual form of contract, the positions of the vendor, and of the purchaser, differ materially in this respect. For the vendor has, in general, parted with nothing, but, on the contrary, has received a deposit, and has, therefore, no need to invoke the assistance of the Court. He may remain passive, and this for him is equivalent to rescission. The purchaser is, however, in circumstances of greater difficulty, because he may not be able to recover his deposit without an action.

Cancellation of the agreement.

When the Courts of Equity and Common Law possessed diverse jurisdictions, it was occasionally necessary for the vendor to obtain the delivery of the agreement in order that the purchaser might not be able to sue upon it at law; but it is conceived that such a course would not, under ordinary circumstances, be now necessary, as the same grounds of defence are available in the Queen's Bench as in the Chancery Division. Questions as to the right to rescind were frequently raised under the old practice, upon an application to the Court of Chancery for an injunction restraining an action on the agreement in the Courts of common law; this procedure was abolished by the Judicature Act, s. 24 (5).

As the fraud of one party entitles the other to rescind the contract even after it has been completed (see *ante*, p. 413), *à fortiori* it is a ground for the rescission of an executory contract. A contract based on fraudulent misrepresentations will be set aside, although the misrepresentations were verbal, and were followed by a written contract which did not include them by way of warranty: *Attwood* v. *Small*, 6 Cl. & Fin. 232.

Misrepresentation.

But actual fraud is not necessary to enable the Court to rescind a contract of sale, at all events while it remains unexecuted: *Torrance* v. *Bolton*, L. R. 8 Ch. 118. The rule has been thus explained by Jessel, M. R., in a recent case: "According to the decisions of Courts of equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was: 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it.' The other way of putting it was this: 'Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency. No man ought to seek to take advantage of his own false statements.' The rule in equity was settled, and it does not matter on which of the two grounds it was rested": *Redgrave* v. *Hurd*, 20 Ch. D. 1, 12. See also *Higgins* v. *Samels*, 2 J. & H. 460; *Jennings* v. *Broughton*, 5 De G. M. & G. 126; *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101; *Smith* v. *Land and House Property Corporation*, 28 Ch. D. 7; *Brewer* v. *Brown*, 28 Ch. D. 309. And see as to the somewhat more limited view taken by the Courts of common law, *Kennedy* v. *Panama, &c. Mail. Co.*, L. R. 2 Q. B. 580.

No intention of paying the purchase-money.

It seems that if it can be made out that a purchaser when he entered into the contract had no means or intention of paying

Chap. XXX. s. 1.

the purchase-money, the vendor is entitled to rescind the contract: *Ex parte Whittaker*, L. R. 10 Ch. 446.

Fraud after contract.

It was laid down in very broad terms by Lord Justice James that any surreptitious dealing between one principal and the agent of the other principal, was a fraud cognizable in a Court of equity; and that the defrauded principal, if he came in time, was entitled to have the contract rescinded: *Panama, &c. Telegraph Co.* v. *India Rubber, &c. Co.*, L. R. 10 Ch. 515, 526; see also *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394, 457. Fraud committed after the contract may thus have a retrospective effect, and entitle the party, who has been deprived thereby of the full benefit of his contract, to have the whole transaction set aside.

Fraud of vendor and his solicitor.

Where the vendor and his solicitor, pending the investigation of the title, went to the purchaser behind the back of his legal adviser, and induced him to pay the purchase-money, and covenant for production of the title deeds, it was declared that the plaintiff had been induced to complete his contract by false and fraudulent representations, and that the agreement should be delivered up to be cancelled, and the defendants were ordered to pay the expenses of investigating the title, and the costs of the suit: *Berry* v. *Armistead*, 2 Keen, 221.

Fraud of agent.

"The fraud of the agent who makes the contract is the fraud of the principal," and will support a claim for rescission: *Wheelton* v. *Hardisty*, 8 E. & B 232; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145.

Mistake a ground for rescission.

It is clearly established that when relief is sought on the ground of mistake or surprise, parol evidence is admissible to prove that the written agreement is contrary to the real terms of the contract, and therefore that the written agreement ought to be rescinded: per Stuart, V.-C., *Price* v. *Ley*, 4 Giff. 235, 251; see also *Hitchcock* v. *Giddings*, 4 Pri. 135; and the observations on that case in *Clare* v. *Lamb*, L. R. 10 C. P. 334, 341.

Mutual mistake.

An agreement which is made under a mutual mistake will be set aside: *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223; *Jones* v. *Clifford*, 3 Ch. D. 779.

Unilateral mistake.

It was said by Sir E. Sugden that "a mistake on one side might be a ground for rescinding a contract:" *Mortimer* v.

Shortall, 2 Dru. & War. 363, 372; and see *Bentley* v. *Mackay*, 4 De G. F. & J. 279; *Paget* v. *Marshall*, 28 Ch. D. 255. As to the circumstances which will make a mistake on one side a valid defence to an action for specific performance, see *ante*, p. 418.

Default of one party.

The question has now to be considered, what default of one party entitles the other to rescind the contract? Lord Coleridge has thus stated the principle:—"In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract": *Freeth* v. *Burr*, L. R. 9 C. P. 208.

This statement was, in a recent case, accepted by the Earl of Selborne, L. C., in the House of Lords, and explained in the following terms: "I am content to take the rule, as stated by Lord Coleridge in *Freeth* v. *Burr*, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind": *Mersey Steel & Iron Co.* v. *Naylor*, 9 App. Cas. 434, 438.

Breach must go to the root of the contract.

The right to rescind depends upon whether the breach by the other party goes to the root of the contract. If it is such as only to confer an independent right to damages, there is no right to rescind. See the speech of Lord Blackburn in the case last cited; 9 App. Cas. 442.

Sale of goods by instalments.

Thus, where there is a contract for the sale of goods to be delivered by instalments, the question has frequently arisen, whether, if the buyer fails to pay for one instalment, the seller is justified in repudiating the contract. It is not easy to reconcile all the cases; but the principle underlying them seems to be, that non-payment, in order to set the seller free, must be equivalent to a statement that the buyer will not, or cannot, carry out the contract. See *Withers* v. *Reynolds*, 2 B. & Ad.

Chap. XXX. s. 1.

882; *Hoare* v. *Rennie*, 5 H. & N. 19; *Coddington* v. *Paleologo*, L. R. 2 Ex. 193; *Simpson* v. *Crippin*, L. R. 8 Q. B. 14; *Ex parte Chalmers*, L. R. 8 Ch. 289; *Bloomer* v. *Bernstein*, L. R. 9 C. P. 588; *Morgan* v. *Bain*, L. R. 10 C. P. 15; *Re Phœnix Bessemer Steel Co.*, 4 Ch. D. 108; *Ex parte Stapleton*, 10 Ch. D. 586; *Howck* v. *Muller*, 7 Q. B. D. 92.

On sales of land the conditions are mutually dependent.

In agreements for the sale and purchase of land, the conditions to be performed by the vendor and the purchaser respectively, are, in general, mutually dependent—*i. e.*, a breach by either party goes to the root of the entire contract. If, therefore, there is a substantial breach by one of the parties to an agreement of this nature, it would seem to confer upon the other the right to rescind the contract.

Failure to make a title.

Thus, if the vendor fails to make a good title according to the contract the purchaser may rescind: *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *Cato* v. *Thompson*, 9 Q. B. D. 616.

Purchaser not bound to wait.

And when a person sells property which he cannot convey himself, or compel any other person to convey, the purchaser, as soon as he finds that to be the case, may repudiate the contract, and is not bound to wait to see whether the vendor can induce some third person to join in making a good title to the property sold: *Forrer* v. *Nash*, 35 Beav. 167; *Weston* v. *Savage*, 10 Ch. D. 736; *Brewer* v. *Broadwood*, 22 Ch. D. 105.

Misdescription.

So, where there is a misdescription in a material and substantial point, so far affecting the subject-matter of the contract that it may be reasonably supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, the contract is avoided altogether: *Flight* v. *Booth*, 1 Bing. N. C. 370; see also *Jones* v. *Edney*, 3 Camp. 285; *Dykes* v. *Blake*, 4 Bing. N. C. 463; *Stanton* v. *Tattershall*, 1 Sm. & G. 529; *Brewer* v. *Brown*, 28 Ch. D. 309.

Vendor not bound to wait indefinitely for his money.

On the other hand, the vendor has a right to have the contract executed within a reasonable time, or to be delivered from its obligation: *Broome* v. *Monck*, 10 Ves. 597, 614. Thus where a purchaser died before completion, leaving his affairs in so complicated a condition that the purchase-money could not be obtained for some years after his death, the contract was, at the suit of the vendor, delivered up to be cancelled: *Mackreth* v.

Marlar, 1 Cox, 259; and see *Whittaker* v. *Whittaker*, 4 Bro. C. C. 31.

After decree for specific performance.

Even after a decree has been made for specific performance, the Court will, on the motion of the vendor, rescind the contract where the purchaser makes default in payment of the purchase-money: *Foligno* v. *Martin*, 16 Beav. 586; *Sweet* v. *Meredith*, 4 Giff. 207; *Watson* v. *Cox*, L. R. 15 Eq. 219. But the vendor cannot, if he rescinds, obtain damages for the breach of the contract, or recover damages already assessed: *Henty* v. *Schröder*, 12 Ch. D. 666, where Jessel, M. R., declined to follow in this particular the three last cited cases.

Discharge of purchaser under sale by the Court.

The purchaser of an estate under an order of the Court will be discharged from his purchase upon error being shown in the decree, even though it is about to be rectified: *Lechmere* v. *Brasier*, 2 Jac. & W. 287; or has actually been rectified: *Coster* v. *Turnor*, 1 Russ. & M. 311; see also *Berry* v. *Gibbons*, L. R. 15 Eq. 150; *Powell* v. *Powell*, L. R. 19 Eq. 422; and Chapter VI., SALES BY THE COURT, p. 168.

Lapse of time.

Lapse of time gives a right to rescind in two cases, namely,

Time of the essence.

(1) Where, time being of the essence of the contract, an act is not performed within the stipulated limit. There is, in such a case, a substantial breach of contract which entitles the other party to rescind: *Day* v. *Luhke*, L. R. 5 Eq. 336; *Claydon* v. *Green*, L. R. 3 C. P. 511; and see *Cowles* v. *Gale*, L. R. 7 Ch. 12.

As to the circumstances in which time is considered to be, or may be made of the essence, see *ante*, p. 278.

Abandonment.

(2) Although time is not of the essence of the contract, a long interval of inaction may be accepted as evidence of abandonment: *Lloyd* v. *Collett*, 4 Bro. C. C. 469; and a comparatively short delay created by one party will entitle the other to give notice limiting a reasonable time within which the contract must be perfected; and when the time has been thus fairly limited, by a notice stating that within such a period that which is required must be done or otherwise the contract will be treated as at an end, the Court has very frequently supported that proceeding: per Lord Langdale, M. R., *Taylor* v. *Brown*, 2 Beav.

Chap. XXX. s. 1.

180, 183; see also *King* v. *Wilson*, 6 Beav. 124, and cases cited *ante*, p. 518.

Refusal by one party gives a right to rescind.

Those cases in which one party has, after proper notice, neglected to proceed with the sale may be classed under the head of a refusal by such party to carry out the contract; and it is clear that if there is a definite refusal by one party, the other may accept it and renounce the contract: *Jervis* v. *Berridge*, L. R. 8 Ch. 351.

In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying, "I rescind this contract,"—a total refusal to perform it, or something equivalent to that, which would enable the plaintiff on his side to say, "If you rescind the contract on your part, I will rescind it on mine": per Parke, B., *Ehrensperger* v. *Anderson*, 3 Exch. 148, 158.

So if one party puts it out of his power to complete.

Similarly, if one party puts it out of his power to perform the contract, as by selling the estate, the other may treat the contract as rescinded: *Palmer* v. *Temple*, 9 A. & E. 508; *Lovelock* v. *Franklyn*, 8 Q. B. 371.

Right to rescind, how lost.

The vendor's right to rescind, under a condition conferring that power in the event of his being "unwilling" to remove the purchaser's objections to the title, is of course lost by an attempt to answer the objections: *Tanner* v. *Smith*, 10 Sim. 410; and the right would, in general, be held to have been waived by entering into negotiations as to the removal of the objections: *Cutts* v. *Thodey*, 13 Sim. 206; *Morley* v. *Cook*, 2 Hare, 106; unless the words, "notwithstanding any negotiation in respect of such objection or requisition," were inserted in the condition; see 1 Dav. Conv. 564, 4th ed.

Vendor's right not affected by purchaser's action.

The purchaser cannot, by commencing an action for specific performance, prevent the vendor from exercising his right to rescind; and, if the contract is so rescinded, the plaintiff's action must be dismissed with costs from the time when he received notice of rescission: *Hoy* v. *Smythies*, 22 Beav. 510; *Duddell* v. *Simpson*, L. R. 2 Ch. 102.

Vendor's action a

But if the vendor, on the receipt of the purchaser's objections,

commences an action, he thereby waives his right to rescind under the usual condition: *Warde* v. *Dixon*, 28 L. J. Ch. 315; *Gray* v. *Fowler*, L. R. 8 Ex. 249.

waiver of right to rescind.

It was, however, held in the case last cited that the condition was not confined to objections appearing on the abstract, and that the vendor had a separate right in respect of objections which were found out *aliunde*, and were not taken until after the action had been commenced: *Ibid.*

The assertion of a right under the agreement, as, for example, a claim for rent, after the time when the party was entitled to rescind, is an indication that he treated the agreement as still subsisting; and may amount to a waiver of the right to rescind: *Hudson* v. *Bartrum*, 3 Mad. 440.

Election to rescind for fraud.

It has been already stated that fraud makes a contract voidable not void (see *ante*, p. 413); the following passage shows clearly that the defrauded party must assert his rights by a definite election: In cases of fraud the question is, Has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong doer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined. But we cannot see any principle, and are not aware of any authority for saying that the mere fact that one who is a party to the fraud has issued a writ and commenced an action before the rescission, is such a change of position as would preclude the defrauded party from exercising his election to rescind: per Mellor, J., *Clough* v. *L. & N. W. Ry. Co.*, L. R. 7 Ex. 26, 35.

Right once waived not revived.

So, in an earlier case, it was held that where the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; and that although,

Chap. XXX. s. 1.

as he alleged, he had discovered long afterwards a new incident in the fraud, this could only be considered as strengthening the evidence of the original fraud, and could not revive the right of repudiation which had once been waived: *Campbell* v. *Fleming*, 1 A. & E. 40; see also *Morrison* v. *Universal Marine Insurance Co.*, L. R. 8 Ex. 197, 204; *Reid* v. *London & Staffordshire Fire Insurance Co.*, 32 W. R. 94.

Fraud not easily got rid of.

But "if you once establish a case of fraud, in order to get rid of it by anything like adoption, that adoption must be with an entire and full knowledge of all the facts": per Lord Lyndhurst, *Attwood* v. *Small*, 6 Cl. & Fin. 232, 432; see *Murray* v. *Palmer*, 2 Sch. & L. 474; *Mulhallen* v. *Marum*, 3 Dru. & War. 317, 334. So the effect of a false representation is not got rid of by showing that the person to whom it was made was guilty of negligence. He has a right to rely upon the accuracy of the other party's statement; and the circumstance that the means of discovery lay within his reach (*Rawlins* v. *Wickham*, 3 De G. & J. 304), or that an incomplete investigation was actually made (*Redgrave* v. *Hurd*, 20 Ch. D. 1), does not take away his right to have the contract rescinded.

What is a good defence.

It follows from what has been already stated that the defendant may successfully resist the claim for rescission by showing—(1) that the plaintiff was not, in fact, misled; or (2) that with full knowledge of the truth he elected to carry out the contract: see *Redgrave* v. *Hurd*, 20 Ch. D. 1.

Specific performance and rescission may both be refused.

Before leaving the subject of executory agreements, it may be well to observe that specific performance on the one side and rescission on the other are not remedies which dovetail into each other. There are cases in which one party cannot obtain specific performance, yet the other has no right to rescind the contract—cases, in fact, where under the old practice the plaintiff's bill for specific performance would have been dismissed without prejudice to his legal remedies: *Mortlock* v. *Buller*, 10 Ves. 292, 308; *Turner* v. *Harvey*, Jac. 169; *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1; and see as to the modern practice in cases of this kind, *Tamplin* v. *James*, 15 Ch. D. 215.

SECT. 2.—*After it has been carried into execution.*

Rescission, a remedy to be cautiously applied.

There is no part of the jurisdiction of a Court of equity, says Lord St. Leonards, which requires to be executed with more caution than that of rescinding a contract: Sugden, Law of Property, 598. And the same great authority lays it down that unless a clear fraud be established, there ought to be no relief in equity, for there is a great difference between establishing and rescinding an agreement: Sugden, V. & P. 244. If, as appears to be the case, he is here dealing rather with executory than with executed contracts, it is clear that these statements are not in accordance with modern practice: see the observations of James, L. J., in *Torrance* v. *Bolton*, L. R. 8 Ch. 118, 124. As to executed contracts, however, they seem to express the principles on which the Court should act in the great majority of cases. The effect, however, of the Judicature Act has been, it is submitted, to strengthen the position of the Court in rescinding contracts; since it is now able to take into account both legal and equitable rights, and in every action—whether for specific performance or for rescission—to make such an order as shall be final and conclusive between the parties.

Effect of Judicature Act.

Rescission in some cases without fraud.

Even in the case of contracts completed by payment of the purchase-money on the one side, and execution of the conveyance and delivery of possession on the other, the Court may, it seems, even in the absence of fraud, set aside the sale upon equitable terms.

Purchase of a man's own estate.

Thus, where a man, in ignorance of his rights, purchased his own estate, and afterwards filed a bill to have the purchase-money refunded, he obtained a decree for repayment of the money with interest and costs; for, "though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the Court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right": *Bingham* v. *Bingham*, 1 Ves. sen. 126. Compare and distinguish *Okill* v. *Whittaker*, 2 Ph. 338.

Jurisdiction doubted by

But Lord Redesdale seems to have entertained some doubt as

Chap. XXX. s. 2.

Lord Redesdale.

to the jurisdiction, for in an Irish case he said: "If it were clear beyond all possibility of doubt that fraud, or perhaps mere ignorance, had induced S. to accept the lease of 1759, the Court might control the setting up that lease—in a case of fraud it certainly might; in a case of mere ignorance, though I incline to think it might, yet, after looking a little into the subject, I find great difficulty in holding that a Court of equity could interfere": *Saunders* v. *Lord Annesley*, 2 Sch. & L. 73, 101.

Rescission for common mistake approved by House of Lords.

The doctrine of *Bingham* v. *Bingham*, however, has been approved in the most unqualified terms by Lord Cranworth in *Cooper* v. *Phibbs*, L. R. 2 H. L. 149, 164. In the latter case an agreement for a lease was set aside on the ground of common mistake, the lessee being in fact entitled, although none of the parties were aware of it, as tenant for life of the premises comprised in the agreement.

In a recent case, Hall, V.-C., after referring to the case of *Cooper* v. *Phibbs*, said: "Nothing can be clearer than this, that Lord Cranworth recognized the principle that the Court would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud": *Jones* v. *Clifford*, 3 Ch. D. 779, 792.

Common mistake the only exception.

With this one exception, however, of common mistake affecting the existence of the subject-matter of the contract, the proposition holds good that fraud, and fraud alone, gives the right to call for the rescission of an executed contract. Lord Selborne, L. C., has thus expressed the rule: "When the conveyance takes place it is not, as far as I know, in either country the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived": *Brownlie* v. *Campbell*, 5 App. Cas. 925, 937. See also *Legge* v. *Croker*, 1 Ball & B. 506; *Early* v. *Garret*, 9 B. & C. 928; *Burnes* v. *Pennell*, 2 H. L. C. 497, 529; *New Brunswick Ry. Co.* v. *Conybeare*, 9 H. L. C. 711; *Wood* v. *Keep*, 1 F. & F. 331; *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 79; *Hart* v. *Swaine*, 7 Ch. D. 42: *Allen* v. *Richardson*, 13 Ch. D. 524, 542; *Nash* v. *Wooderson*, 33 W. R. 301.

Rectification or rescission.

In some cases a person who has executed a lease or conveyance under a mistake may ask alternatively for rectification or rescission; and if the Court concludes that the defendant inequitably took advantage of the plaintiff's mistake, it will put him to his election either to agree to the true terms of the contract, or to give up his lease or conveyance upon the usual terms of restitution: *Garrard* v. *Frankel*, 30 Beav. 445; *Harris* v. *Pepperell*, L. R. 5 Eq. 1; *Paget* v. *Marshall*, 28 Ch. D. 255.

If the plaintiff claims rectification simply, yet an option may be given to the defendant to rescind, and if the plaintiff in such a case declines to accept rescission his action will be dismissed with costs: *Bloomer* v. *Spittle*, L. R. 13 Eq. 427.

Fraud.

A party who has been induced by fraud to enter into a contract, has a right to have it set aside, and not merely to have the fraudulent representations made good: *Rawlins* v. *Wickham*, 3 De G. & J. 304; and a fraudulent assertion of title is no exception to the rule: *Hart* v. *Swaine*, 7 Ch. D. 42.

Lessor without a title.

And on a similar principle, it has been held that a lessee may avoid his lease when the lessor knew at the time of granting it that he had no title to a material part of the premises; and, without affirmative fraud, concealed from the intending lessee the fact of his want of title. Circumstances which would justify rescission in equity are a good defence to an action for the rent at law: *Mostyn* v. *West Mostyn Coal Co.*, 1 C. P. D. 145.

Misrepresentation must be fraudulent.

In one of the earliest cases where the jurisdiction was exercised, Lord Eldon said: "The case resolves itself into this question, whether the representation made to the plaintiff was not, in the sense in which we use the term, fraudulent? I am not apprised of any such decision, but I agree with the Master of the Rolls, that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract": *Edwards* v. *M'Leay*, 2 Sw. 287, 289.

Rescission and action of deceit.

It must not, however, be supposed that the same degree of fraud is necessary for the rescission of an executed contract as for an action of deceit. Fraudulent concealment without any active misstatement, although not sufficient to support an action

of deceit (see *ante*, p. 408), may yet be sufficient ground for setting aside a sale: *Early* v. *Garret*, 9 B. & C. 928; *New Brunswick Ry. Co.* v. *Conybeare*, 9 H. L. C. 711, 743; *Central Ry. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99; *Peek* v. *Gurney*, L. R. 6 H. L. 377, 390; *Redgrave* v. *Hurd*, 20 Ch. D. 1, 12; *Brewer* v. *Brown*, 28 Ch. D. 309.

In many cases, indeed, passages occur which seem to imply that the two actions may be maintained under the same circumstances; see *Small* v. *Attwood*, You. 407, 461; *Attwood* v. *Small*, 6 Cl. & Fin. 232, 395, 444; *Lovell* v. *Hicks*, 2 Y. & C. Ex. 46, 51. But such passages must be read literally, viz., that where there is actual fraud, an action of deceit or an action for rescission will lie; and not as imputing that rescission can only be obtained under the circumstances there mentioned.

Rescission for imputed fraud.

False assertions, for example, made by one person on the faith of representations received from his partner or his agent, may be a sufficient ground for setting aside a transaction founded on such assertions, but cannot be relied upon as conferring a right of action for deceit: *Rawlins* v. *Wickham*, 3 De G. & J. 304; *Re Reese River Silver Mining Co.*, L. R. 2 Ch. 604, 611.

Wilde v. *Gibson*.

The case of *Wilde* v. *Gibson* (1 H. L. C. 605) may at first sight appear to conflict with the foregoing propositions. It was a suit to set aside an executed contract on the ground of fraudulent concealment by the vendor of a defect in the title; and the bill was dismissed because the plaintiff failed to prove direct personal knowledge and concealment by the vendor. The issue would thus appear to have been regarded as identical with that in an action of deceit; but the case in reality turned to a great extent upon the allegations of fraud in the plaintiff's bill; see pp. 621, 627.

Contract induced by fraud is voidable, not void.

The effect of fraud being not to render a contract void, but voidable only at the election of the party defrauded (see *ante*, pp. 413, 425), some important consequences result from this, the most obvious of which is, that, in the case of an executed contract, the estate having passed by the conveyance, must be reconveyed if the sale is set aside: *Clark* v. *Malpas*, 4 De G. F. & J. 401; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221; and see cases cited under RECTIFICATION, *ante*, p. 434.

A deed obtained by fraud in some cases does not pass the estate.

But where the parties to a deed have at the date of its execution no intention that any estate should pass from the one to the other, and are merely cheated into the execution of the deed without a knowledge of its contents, no estate passes, and no reconveyance can properly be directed: *Ogilvie* v. *Jeaffreson*, 2 Giff. 353; see *Hunter* v. *Walters*, L. R. 7 Ch. 75.

Forgery.

And no reconveyance is, of course, necessary in the case of a forged deed: *Re Cooper*, 20 Ch. D. 611.

But where one of three trustees forged the signatures of his co-trustees to an assignment of the trust property, it was held that his own execution was sufficient to pass the legal interest in one-third, and accordingly that a reconveyance was necessary: *Boursot* v. *Savage*, L. R. 2 Eq. 134.

Rights of third persons intervening.

A further consequence of the doctrine that a purchase obtained by fraud is voidable and not void, is that, if the rights of innocent third parties have supervened, rescission will only be ordered if it does not compromise the position of such third parties.

Restitutio in integrum.

There can be no rescission of the contract unless the parties can be placed in *statu quo:* per Baron Parke, *Blackburn* v. *Smith*, 2 Exch. 783, 790.

This rule was so rigidly acted upon at common law, that an occupation of the premises under the agreement was held to preclude rescission: *Hunt* v. *Silk*, 5 East, 449; *Blackburn* v. *Smith*, 2 Exch. 783.

Even in cases of fraud, a contract cannot be rescinded after one party has rendered it impossible to restore the other to his original condition: *Clarke* v. *Dickson*, E. B. & E. 148.

In equity.

The rule adopted by Courts of equity might have been expressed in the identical terms used by Baron Parke, namely, that there can be no rescission unless the parties can be placed in *statu quo;* but the Courts of equity gave a wider interpretation to the rule, and considered that the *status quo* might be restored in a variety of ways impossible from a common law point of view.

Difference explained by Lord Blackburn.

The difference is clearly marked by Lord Blackburn in the following extract: "It is, I think, clear on principles of general justice that, as a condition to a rescission, there must be a *restitutio in integrum*. The parties must be put in *statu quo*.

Chap. XXX. s. 2.

See per Lord Cranworth in *The Western Bank* v. *Addie*, L. R. 1 H. L. Sc. 165. It is a doctrine which has often been acted upon both at law and in equity. But there is a considerable difference in the mode in which it is applied in Courts of law and equity, owing as I think to the difference of the machinery which the Courts have at command. It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property; or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. But as a Court of law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit. But a Court of equity could not give damages, and unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration": *Erlanger* v. *New Sombrero Co.*, 3 App. Cas. 1218, 1278.

Difference no longer exists.

The difference between the rules of law and equity as regards rescission has now disappeared (see *Redgrave* v. *Hurd*, 20 Ch. D. 1, 12); and Courts of equity, moreover, have the same power as Courts of law of awarding damages (Fry on Specific Performance, 552), yet the above statement is valuable as clearly indicating the meaning which must now be attached in all the Courts to the expression *restitutio in integrum*.

Possession no bar.

Deterioration.

It seems clear that, notwithstanding the common law decisions to the contrary, the circumstance of the purchaser having been in possession of the property is no bar to rescission; but if he has not only been in possession, but has changed the character of the property, by working mines and cutting down trees, rescission can, it seems, only be obtained on the ground of fraud: *Attwood* v. *Small*, 6 Cl. & Fin. 232.

Acts of ownership.

Lord Chelmsford, however, seems to have considered, in a case of common mistake, that the construction of a warping drain, and the enclosure of a common, would not render it imprac-

ticable to reinstate the parties in the full integrity of their former rights: *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223, 232.

Concession.

The impossibility of restoring a concession which was voidable at the date of the sale, and was subsequently avoided, does not prevent rescission: *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394, 454.

Terms on which rescission ordered.

Occupation rent.

On rescinding a contract the Court endeavours, as far as possible, to effect a *restitutio in integrum;* and with this object, the purchaser who has been in possession is fixed with an occupation rent: *Donovan* v. *Fricker*, Jac. 165; or charged with the amount of the rents and profits received, or which but for his wilful neglect and default he might have received: *Gibson* v. *D'Este*, 2 Y. & C. C. 542, 581; see *Murray* v. *Palmer*, 2 Sch. & L. 474, 490; but where there was great delay the account was not carried back farther than the institution of the action: *Pickett* v. *Loggon*, 14 Ves. 215: *Mulhallen* v. *Marum*, 3 Dru. & War. 317.

Repayment of purchase-money.

The vendor, on the other hand, has to repay the purchase-money with interest: *Donovan* v. *Fricker*, Jac. 165.

Annual rests.

Where the rent payable by the purchaser greatly exceeds the interest on the purchase-money, annual rests will be directed until the time when the principal would have been liquidated by the excess of the rent: *Ibid.;* and see the form of the decree in *Gibson* v. *D'Este*, 2 Y. & C. C. 542, 581.

Rate of interest.

The rate of interest allowed in this case was five per cent., and so in *Edwards* v. *M'Leay*, 2 Sw. 287. But four per cent. is the rate now usually charged (see *Cooper* v. *Phibbs*, L. R. 2 H. L. 149, 173), except "where a trustee has been chargeable with a misuse—still more if it be a misappropriation of trust money—or where he has been guilty of misfeasance or fraud": per Lord Cairns, *Imperial Mercantile Credit Association* v. *Coleman*, L. R. 6 H. L. 189, 209.

Improvements and repairs.

A plaintiff seeking to set aside a contract appeals to the equitable jurisdiction of the Court, and can have relief only upon equitable terms. Thus, even when he comes to the Court to set aside a conveyance for fraud, if the grantee has made lasting improvements, the Court will do him justice, and let him have

Chap. XXX. s. 2.

satisfaction for them: *Att.-Gen.* v. *Baliol Coll. Oxford*, 9 Mod. 407, 412; *The York Buildings Co.* v. *Mackenzie*, 8 Bro. P. C. 42; *Trevelyan* v. *White*, 1 Beav. 588; *Neesom* v. *Clarkson*, 4 Hare, 97. But the defendant's enjoyment of the improvements will be taken into account: *Murray* v. *Palmer*, 2 Sch. & L. 474, 490. In *Edwards* v. *M'Leay* (2 Sw. 287), Lord Eldon rectified the decree by striking out the word "improvements," leaving the word "repairs," because the plaintiff's bill prayed relief as to the latter alone. The purchaser is not entitled to be reimbursed for any improvements which he may have adopted as a matter of taste, or as a matter of personal convenience; and where he is charged with deterioration, the amount will be set off against what is payable to him in respect of improvements: *Mill* v. *Hill*, 3 H. L. C. 828, 869.

Premiums.

A purchaser of a life interest will be allowed sums paid for premiums for insuring the life: *Boswell* v. *Coaks*, 27 Ch. D. 424, 458.

Lien.

A sale and a sub-sale having been both rescinded, the sub-purchaser was declared entitled to a lien for "prematurely paid purchase-money" on moneys in Court, which represented the deposit paid to the original owner: *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101.

Lapse of time taken into account.

In a case where a sale by the Court was set aside after a considerable time, the purchasers were, having regard to the length of time which had elapsed, ordered to repay only the amounts which they had respectively received. But it was intimated that, if the transaction had been of recent date, the order would have made the defendants jointly and severally liable for the total amount of the purchase-money: *Boswell* v. *Coaks*, 27 Ch. D. 424, 459.

Purchaser *pendente lite*.

If the sale of an estate is set aside, the subsequent sale to a purchaser *pendente lite* will also be set aside; and in that event the compensation payable to such last-mentioned purchaser has to be considered. It seems that he will be entitled to repayment of his purchase-money from his co-defendant, and to an allowance for substantial repairs and lasting improvements from the plaintiff: *Trevelyan* v. *White*, 1 Beav. 588; and see *Sorrell* v. *Carpenter*, 2 P. Wms. 482.

Plaintiff must come quickly.

In cases of alleged fraud it is the duty of any one complaining of the fraud to put forward his complaint at the earliest possible period: *Jennings* v. *Broughton*, 5 De G. M. & G. 126, 139; *Peek* v. *Gurney*, L. R. 6 H. L. 377, 384.

And this rule applies with additional force to purchases of mines and property of speculative value: *Ibid.*; *Pickett* v. *Loggon*, 14 Ves. 215, 243.

In the last-mentioned case, indeed, a conveyance was set aside after the lapse of twelve years; but the decision seems to have turned to some extent on the defendant's pleading: see p. 244.

Delay under the Statute of Limitations is counted from the time when the plaintiff might with reasonable diligence have discovered the fraud (3 & 4 Will. 4, c. 27, s. 26); but the equitable doctrine of laches as a bar to relief will not be applied where the plaintiff, although the means of discovery lay within his reach, failed to discover the falsehood of the defendant's statement. He is not in fact bound to use "reasonable diligence," but is entitled to rely absolutely upon the representations made to him: *Redgrave* v. *Hurd*, 30 W. R. 251, 354; and see *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, 239.

Laches affected by the nature of the contract.

The promptitude which a plaintiff should display in coming for rescission depends to a large extent on the nature of the contract, and the probability of third persons being affected by the delay. Thus, where a shareholder seeks to be relieved of his shares on the ground of misrepresentation, he is bound to use the utmost diligence: *Heymann* v. *European Central Ry. Co.*, L. R. 7 Eq. 154; and see *Central Ry. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99; *Re Reese River Silver Mining Co.*, L. R. 2 Ch. 604; affirmed *ibid.* 4 H. L. 64; *Reid* v. *London and Staffordshire Fire Insurance Co.*, 32 W. R. 94.

A winding-up order makes rescission impossible (*Oakes* v. *Turquand*, L. R. 2 H. L. 325), even if the creditors can be paid in full: *Burgess's Case*, 15 Ch. D. 507. Declared insolvency also puts an end to the right of rescission: *Tennent* v. *City of Glasgow Bank*, 4 App. Cas. 615; and see *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.

INDEX.

ABSTRACT,
May supply omission of vendor's name, 35.
Delivery of, 75.
Not a part performance, 27.
Condition of sale as to, 75.
Time for, 75.
Time waived, 75.
Purchaser only entitled to one, 76.
Commencement of,
Under conditions of sale, 79.
Under open contract, 193.
Preparation of, 190.
When deeds are not in vendor's possession, 190.
Who entitled to, 191.
Costs of, 191.
Contents, 191.
What is a perfect abstract, 191.
Legal estate, 192.
Satisfied terms, 192.
Discharged incumbrances, 192.

ACCEPTANCE,
By parol of written offer, 54.
Unqualified, makes a contract, 54.
Qualified, is a fresh offer, 55.
What is a reasonable time for, 56.
Must be communicated to the other party, 56.
What amounts to, 57.

ACCOMMODATION WORKS,
Specific performance, 443.

ACCOUNT,
When ordered in specific performance, 466.
Of rents and profits, 471.

ACKNOWLEDGMENT AND UNDERTAKING, 302. [*And see* DEEDS.]

ACKNOWLEDGMENT OF DEEDS,
By married woman, 300.

ACQUIESCENCE,
By *cestui que trust* in purchase by trustee, 140.
Waiver of requisitions by, 248.
Time for completion, 280.

ACT OF PARLIAMENT,
Notice by, 314, 361.

ACTIO PERSONALIS MORITUR CUM PERSONÂ, 505.

ACTION,
For breach of covenant in a void demise, 5.
Upon an executed parol contract, 23.
Against auctioneer for deposit, 110, 112.
By purchaser for deposit, 119, 354.
For breach of contract in cases of misdescription, 354.
Transfer of, to Chancery Division, 354.
Cannot be brought after order on summons, 490.
See also COVENANTS FOR TITLE; DECEIT, ACTION OF; RESCISSION; SPECIFIC PERFORMANCE.

ACTUAL NOTICE, 313. [*See* NOTICE.]

ADMISSIONS,
In pleading, judgment on, 466.
Money ordered into Court on, 469.

ADVERTISEMENT,
Misrepresentation in, 394.

AGENT,
Signature by, 18.
Appointment of, by parol, 18.
Contract by, for undisclosed principal, 36.
Auctioneer's position as, 102.
Receiving the deposit, 110.
Trustees may employ, 129.
Cannot purchase, 137, 409.
Except with knowledge of his principal, 137.
Notice to, binds principal, 326. [*See* NOTICE.]
Misrepresentation by, 385.
Fraud of, justifies rescission, 386.
whether principal personally liable, 386, 388.
within the scope of his authority, 388.
when principal reaps the benefit, 388.
Mistake of, no ground for opening biddings, 418.
Concealment by, a ground for rescission, 409.
Secret bargain with the other party, 410.
Specific performance of contract by, 447.

AGREEMENT,
For a lease,
Must be in writing, 3.
Specific performance of, 5, 441.
Confers the same rights as a lease, 5.
Material terms of, 33, 46.
Names of lessor and lessee, 46.
Description of the property, 46.
Commencement and duration of term, 46.
Compensation for misdescription, 356, 376, 380.
Mistake as to legal effect of, 420.
For sale of land,
Must be in writing, 1.
And signed by the party to be charged, 2.
And personalty, when separately enforceable, 13.
Signature of, to satisfy Statute of Frauds, 15.
Memorandum or note of, 20.
Form of, 32.
Material terms of, 33.
Names of parties, 33.
Description of the property, 37.
The price, 38.
By offer and acceptance, 54.
May consist of several documents, 62.
Under Lands Clauses Act, 176.

AGREEMENT—*continued.*
For sale of land—continued.
Stamp duty, 305.
How far in force after conveyance, 355.
Mistake in, 421.
Admission of parol evidence, 421. [*See* PAROL EVIDENCE.]
Variation of, by parol, 421.
Discharge of, by parol, 427.
Not rectified, 430.
Specific performance of, 441.

ALIUNDE,
Defects discovered, 79.

ALLOTMENTS,
What title must be shown to, 194.
Tenure of, 194.
When included in conveyance, 293.

ALTERNATIVE RELIEF, 451, 493, 529.

AMBIGUITY,
Explained by a plan, 291.
When a misdescription, 350.
In cases of misrepresentation, 401.
When a ground for rescission, 420.
Parol evidence to explain latent, 422, 424, 430.
Specific performance of agreement containing, 452.

AMENDMENT OF PLEADING,
In specific performance, 451.

ANCIENT LIGHT, 215. [*And see* PRESCRIPTION ACT.]

APPEAL,
From Chambers, 490.
To Court of Appeal,
From Chambers direct, 490.
From adjourned summons, 490.

APPORTIONMENT,
Of rent-charges, 90.
Of rent on sale of leaseholds, 90.
reversion, 90.
Of covenants and conditions, 91.
Provisions of Conveyancing Act, 1881..91.
Of purchase-money, 308.

APPROPRIATION OF PURCHASE-MONEY,
Avoids payment of interest, 258.
What is sufficient, 258.

APPROVAL,
Of draft, when sufficient memorandum, 21, 22.
Of title by solicitor, stipulation as to, 61.

ARBITRATION,
Price fixed by, 38.
How it differs from valuation, 40.
Revocation of submission, 41.
How far precluded by statute, 41.

ARBITRATORS,
Not named, contract not enforceable, 39.
Revocation of authority, 40.
Evidence of, 44.
Fraud or partiality of, 45.

ASSIGNEES,
Of mortgagor, notice to, before selling, 149.
contract may enforce it, 448.
property bound to carry out contract, 449.

ASSIGNMENT,
Of power of sale to new trustees, 123.
Of life estate, whether it precludes power of sale, 143.
Covenant against, when binding on purchaser, 225, 234.
Of benefit of contract to sub-purchaser, 275.
specific performance, 448.

ATTESTATION OF DEED, 299.

ATTESTED COPY,
Purchaser, when entitled to, 303.
Expense of, 304.

ATTORNEY,
Execution of deed by, 299.
Power of, when irrevocable, 299.

AUCTION,
Sale by, within Statute of Frauds, 2, 99.
Conduct of, 99.
Different practice in different localities, 100.
Preliminary investigation of title, 100.
Employment of puffers, 106.
Sale without reserve, 107.
Retracting biddings, 108.

AUCTIONEER,
Signature by, 36.
Authority need not be in writing, 101.
may be revoked before sale, 101.
selling without, personally liable, 101.
to make statements, 386.
Trustee acting as, not entitled to commission, 101.
Agent for both parties, 102.
Agency for purchaser limited, 102.
Cannot delegate duties, 102.
Clerk of, has no authority to sign, 102.
Liability of, to vendor, 103.
purchaser, 103.
for selling without authority, 104.
as to the deposit, 110.
Remuneration of, 104.
Verbal declarations of, 67, 108.
A stakeholder as to the deposit, 109.
Duties of, as to deposit, 109.
Deposit how paid to, 111.
May interplead, 112.
When made a defendant, 113, 447.
Innocent misrepresentation by, 386.

AUTHORITY,
Of auctioneer, how conferred, 101.
revoked, 101.
Of agent to make statements about property, 385.

AWARD,
Court cannot supply defect of, 40.
When set aside, 44, 45.

BANKRUPT,
Sale by trustee of, 154.
Settlement by, 220.
Fraudulent preference by, 220.

BANKRUPTCY,
Of vendor, 274, 449.
Of purchaser, 274, 449.
Proof in, for damages, 118.
Exemption from stamp duty, 308.

BARGAIN,
No damages for loss of, 497.

BEER-HOUSE,
Distinguished from beer-shop, 233.
Covenant not to keep, 233.

BELIEF,
Matter of, not misrepresentation, 396.

BID, RIGHT TO,
Reservation of, 73, 106.
Must not be exceeded, 107.

BIDDING,
Condition of sale as to, 73.
May be retracted before hammer falls, 74, 108.
Practice of opening, abolished, 165.
By mistake for wrong lot, 418.

BILL OF EXCHANGE,
Auctioneer should not receive, for deposit, 111.

BIRTHS,
How proved, 199.

BREACH OF CONTRACT,
Rescission for, 521.

BREACH OF TRUST,
Contract involving, not enforced, 133, 380, 460.

BUILDING LAND,
Conditions of sale as to, 88.
Intended roads, 88.
sewers, 89.
Tenant for life can sell, 90.
Covenants as to buildings, 231.

BUILDING SOCIETY,
Statutory receipt indorsed by, 346.

BUILDINGS,
No specific performance of agreements as to, 441.
Agreement enforced though it comprises, 442.

BUSINESS,
Time of the essence on sale of, 277.

CAIRNS' ACT,
Damages under, 478.
How far repealed, 478.
Created no new right to damages, 480.
Claim for damages, still construed with reference to, 493.

CANCELLATION,
Of deed does not divest estate, 435.
Of agreement, whether now necessary, 518.

CAVEAT EMPTOR,
Patent defects, 349.
Vague and indefinite statements, 369.
Has no application in cases of misrepresentation, 406.
Mistakes of law, 439.
Failure of title, 506.

CERTIFICATE,
Of chief clerk, finding as to title, 473.
how varied, 473.
title perfected before filing of, 477.

CHARITY,
Sale by trustees of, 155.
Consent of commissioners, 155.
Land purchased not out of endowments, 155.
Land sold to railway company, 156.
Purchase of lands for, 158.
Voluntary conveyance to, whether within 27 Eliz., 224.
Succession duty on gift to, 239.
Lease by, notice of invalidity, 316.

CHEQUE,
Deposit may be paid by, 111.

COLLATERAL AGREEMENTS,
As to chattels may be enforced,
If the contracts are distinct, 13.
If the contract concerning land has been executed, 13.
Distinguished from parol variations, 14, 425.

COMMENCEMENT OF TERM,
Must be specified in agreement for a lease, 33.

COMMENCEMENT OF TITLE,
Condition limiting, 79.
Under open contract, 193, 243.
[*And see* TITLE.]

COMMENDATION,
Caveat emptor applies, 369.
No action of deceit for, 399.

COMMISSION,
Auctioneer who is a trustee cannot charge, 101.
When auctioneer entitled to, 104.
A disbursement allowed on taxation, 105.

COMMON,
Part of, taken by railway company, 174.
Right of, how acquired under Prescription Act, 209.
an objection to title, 374.
decree declaring no breach of covenant for quiet enjoyment, 511.
Re-grant of, after enfranchisement, 209.

COMPANY,
Shares in, not within Statute of Frauds, 12.
Signature of director in minute book of, 19.
Promoters in a fiduciary position towards, 139, 410.
Purchase by, 170. [*And see* LANDS CLAUSES ACT.]

COMPENSATION,
Condition allowing, 93, 128.
after conveyance, 355.
does not apply to gross or intentional errors, 366.
excluding, 94.
does not cover large deficiency, 364, 366, 377.
For injury under Lands Clauses Act, 186.
Not given when purchaser knew of defect, 349.
Unless there is an express contract, 349.
Principle introduced in equity, 351.
not to be extended, 352.
Vendor cannot claim, 352.
Except under condition, 353.
Not given after completion, 354.
Except under condition, 355.
For incumbrances, 355.
For defects of title, 506.
Assessment of, 356.
Deficiency in quantity, 356.
length of term, 356.
Undivided shares, 357.
Life estate and reversion, 357.
Rent-charge, 358.
Differences of tenure, 358.
Difficulty of, 372, 375.
Vendor cannot compel purchaser to take, except for slight defects, 365.
Defects in quantity, 365.
title to small part, 365.
length of term, 365.
Quit rents, 366.
Purchaser may in general compel, 375.
Purchaser refused, where excluded by contract, 377.
vendor has rescinded, 378.
compensation cannot be ascertained, 378.
hardship to the vendor, 379.
knowledge or notice of defect, 380.
specific performance would involve breach of trust, 380.

COMPLETION,
Condition as to time, 95.
Changes before, 271.
in the property, 271.
in the parties, 273.
costs occasioned by, 484.
Time for, 276. [*And see* TIME.]
Action for misdescription after, 354.
Purchaser's remedy in respect of incumbrances after, 355.

CONCEALMENT,
Of defects avoids contract, 370.
When fraudulent, 394.
"Industrious," 412.
By purchaser, 412.
No action of deceit for, 502.

CONDITIONS OF SALE,
Preparation of, 66.
Construed in favour of purchaser, 66.
Corrections in, 67.
Second edition of, 67.
The biddings, 73.
Fixtures and timber, 74.
Delivery of abstract, 75.
Time for requisitions, 76.
Rescission of contract, 77.

CONDITIONS OF SALE—*continued.*
Commencement of title, 79.
Special, as to title, 81.
Recitals to be evidence, 83.
Receipt for rent to be evidence, 84.
Identity of property, 86.
Rights of way and easements, 87.
Land for building, 88.
Apportionment of rents, 90.
Indemnity by purchaser of lease, 91.
Expenses of proving title, 92.
Deeds, 92.
Compensation, 93, 355, 364, 366, 377.
Completion of purchase, 95.
Resale, 97.
Forfeiture of deposit, 97.
Depreciatory, 127.

CONDUCT OF SALE,
To whom given, 163.

CONFIRMATION,
By *cestui que trust* of purchase by trustee, 140.

CONSENT TO SALE,
Where trustees are selling, 125.
By tenant for life, 125.
Whether power lost by alienation, 126.
Not necessary to exercise of trust for sale, 126.

CONSOLIDATION OF MORTGAGES, 342.
What mortgages may be consolidated, 342.
Legal estate not necessary, 342.
Against whom right prevails, 342.
Where mortgagor has sold equity of redemption, 343.
Restriction by Conveyancing Act, 1881..343.

CONSTRUCTIVE NOTICE, 314. [*And see* NOTICE.]
Of defect in property, 361.
Does not control express statement, 361.

CONTRACT,
Statute of Frauds, effect of, on, 1.
Is either parol or specialty, 2.
As to interest in land must be in writing, 3. [*See* INTERESTS IN LAND.]
As to land and personalty, when separable, 13.
Executed as to land, action lies although no writing, 13, 23.
Memorandum or note of, what is a sufficient, 20.
Terms of, must be proved, although part performed, 28.
In pursuance of power, part performance does not apply, 28.
By letters when complete, 56.
the whole correspondence to be considered, 57.
pleading, 451.
Whether concluded, a question for the jury, 59.
Reference to formal agreement, 60.
Open, trustees cannot enter into, 127.
Whether created by notice to treat, 179.
Position of parties under, 256.
How far vendor a trustee, 256.
Effect of misdescription, 351.
Not affected by misrepresentation of third person, 389.
Induced by fraud, voidable, 413.
Effect on, of common mistake, 417.
When subject-matter has ceased to exist, 417.
In writing, cannot be varied by parol, 421.

CONTRACT—*continued.*
To execute works, when specifically enforced, 442.
Under power, how enforced, 447.
By agent, how enforced, 447.
Assignment of, 275, 448.
By lunatic, 454.
infant, 455.
married woman, 455.
Damages for breach of, 494, 498. [*See* DAMAGES.]
Executed and executory, 515. [*See also* RESCISSION, SPECIFIC PERFORMANCE.]

CONVERSION,
By exercise of option to purchase, 47.
relates to the death of lessor, 48, 273.
secus as to estate of lessee, 49, 274.

CONVEYANCE,
Preparation of, 95, 281.
Purchaser must prepare, 281.
Separate deeds, 95, 281.
Of property in mortgage, 281.
Mortgage kept on foot, 281.
Reconveyance, 282.
By a person to himself and another, 289.
Parties, 282. [*And see* PARTIES.]
Recitals, 287. [*And see* RECITALS.]
Operative words, 288. [*And see* OPERATIVE WORDS.]
Receipt, 289. [*And see* RECEIPT.]
Parcels, 291. [*And see* PARCELS.]
Covenants for title, 295. [*And see* COVENANTS FOR TITLE.]
Execution, 298.
Time of taking effect, 298.
Escrow, 298.
Attestation, 299.
In presence of purchaser, 299.
By attorney, 299.
By committee of lunatic, 300.
Acknowledgment by married woman, 300.
Inrolment, 301.
Under the Mortmain Act, 301.
Under the Fines and Recoveries Act, 301.
To bar estate tail in copyholds, 301.
Rectification, 433.
Cancellation does not divest estate, 435.
Presumption, 477.
Plaintiff ready and willing to execute, may recover, 493.
Tender of, by purchaser before action, 496.

CONVEYANCING ACT, 1881,
Sale by mortgagee, 148.
of mortgaged property by Court, 162.
by the Court not invalid from want of jurisdiction, 163.
Provision for incumbrances, 167.
Purchaser of several lots to have but one abstract, 190.
Costs of verifying abstract, 195.
Restricts requisitions, 243, 246.
Covenants for title implied by, 295.
Execution of conveyance, 299.
Acknowledgment and undertaking, 302.

CONVEYANCING ACT, 1882,
Searches, 254.
Acknowledgments by married woman, 300.
Law of notice codified, 312.

COPY OF DEED,
When purchaser entitled to, 303, 304.
Attested, 303.
Expense of, 304.

COPYHOLD,
Sold as freehold, 67, 358.
equal in value to freehold, 360.
Fines should be stated, 69.
Minerals not included, 71.
Intermixed with freehold, 86.
Taken by railway company, 174.
Vesting order for, 285.
Covenants for title on sale of, 297.
Estate tail, how barred, 301.

CORPORATIONS,
May be bound by acts of part performance, 28.

CORRESPONDENCE,
Contract by, 58, 59.

COSTS,
Thrown on purchaser by condition of sale, 92.
by Conveyancing Act, 92, 190.
Of making abstract, 92, 190, 191.
Of proving title, 92.
Of stamping deeds, 92, 309.
Of registering deeds, 92.
On interpleader summons, 113.
Of discharged purchaser on sale by the Court, 169.
On sale to railway company, of contract, 180.
of making title, 183.
of conveyance, 184.
Vendor has to pay, to the time when good title shown, 477, 482.
Exceptions when purchaser plaintiff, 484.
Discretion of the Court as to, 481.
Of action for specific performance,
General rule, 481.
Vendor plaintiff, 481.
Unjustifiable defences, 481.
Title not shown till after action, 482.
Purchaser's objections overruled, 482.
Action dismissed with costs, 483.
Specific performance with costs against, 483.
No costs, 483.
Purchaser plaintiff, 483.
Decree, with costs, 483.
When plaintiff has to pay, 484.
No costs, 484.
Reference of title, 484.
Changes before completion, 484.
Vesting order, 485.
Of action asserting legal right, 485.
Of summons under Vendor and Purchaser Act, 489.
Of arbitration under Lands Clauses Act, 494.

COUNTER-CLAIM,
By purchaser for deposit, 117.
By vendor for specific performance, 354.
In action for specific performance, 464.
Has the effect of a cross action, 464.
Striking out, 465.
Against plaintiff and third persons, 465.

COURT, SALE BY,
Not within Statute of Frauds, 3.
Under Partition Act, 159.
In redemption and foreclosure actions, 162.
On application of equitable mortgagee, 162.
Under Settled Estates Act, 163.
Jurisdiction not to be questioned, 163.
Conduct of sale, 163.
Leave to bid, 164.
Purchaser must not mislead Court, 165.
Certificate of result, 165.
Opening biddings, 165.
Payment of purchase-money, 166.
Payment out, 166.
Completion of purchase, 167.
Conveyance, when settled by judge, 168.
Title-deeds, 168.
Discharge of purchaser, 168, 523.

COVENANTS FOR TITLE,
Run with the land, 226, 507.
Implied under Conveyancing Act, 295.
By tenant for life, 297.
On sale of copyholds, 297.
After conveyance, purchaser must rely on, 355, 439, 506.
Who may sue and be sued on, 507, 514.
What is a breach, 508.
Usual vendor's, what are, 509.

Good right to convey,
Broken, if at all, on conveyance, 509.
Unqualified is a warranty, 509.
What is a breach of qualified covenant, 509.
Not broken by tortious eviction, 510.
on eviction by title paramount, 510.
When action for breach may be brought, 510.

Quiet enjoyment,
Not broken till disturbance, 509, 510.
Limited to title or possession, 510.
Obstruction of way, a breach, 510.
Relates to title, not mode of enjoyment, 511.
Does not extend to restrictive covenants, 511.
Or right of common, 511.
Does not enlarge the right to light, 512.
Qualified or absolute, 512.
Measure of damages, 513.

Against incumbrances,
Not broken till disturbance, 509.
Breach of, also a breach of covenant for quiet enjoyment, 513.
In cases of express notice, 514.

Further assurance,
Not broken till refusal, 509.
Whether covenant for production covered by, 513.
Specific performance of, 513.

COVENANTS IN LEASE,
Statement of, in particulars, 69.
Usual and unusual, 70.
Apportionment of, on sale of reversion, 91.
Indemnity against, by purchaser, 91.
Purchaser has notice of, 362.

COVENANTS, RESTRICTIVE,
Should be mentioned in particulars, 70.
Bind a purchaser with notice, 229.
Though "assigns" are not mentioned, 230.
Mutual, on sale of building land, 231.
Lessee of assignee is bound, 231.
Acquiescence in breaches, 232.
Alteration of character of property, 232.
Against trading, 233.
To use house as dwelling-house, 233.
Not to cause a nuisance, 233.
Not to keep public-house, 233.
beer-house, 233.
beer-shop, 233.
Not to sell spirituous liquors, 233.
Not to forfeit licences, 234.
To buy beer of covenantee, 234.
An objection to title, 374.
Even when known to purchaser, 374.
Unless also known to be incapable of release, 374.
Injunction enforcing not a breach of covenant for quiet enjoyment, 511.

COVENANTS RUNNING WITH THE LAND,
In leases,
Relating to the thing demised, 225.
Not relating to the thing demised, 226.
Relating to something not yet *in esse*, 226.
As between vendor and purchaser, 226.
Benefit of covenants, 226.
Burden of covenants, 228.
Covenants for title, 226.
for production of deeds, 226.
relating to user of land, 226.
not to build, 226.

CROPS,
Sale of, whether within Statute of Frauds, 6, 8.

CURRENT ACCOUNT,
Further advances on, after notice of sale by debtor, 313.

CURTESY,
Tenant by, 142, 237.
In gavelkind lands, 237.
In copyholds, 237.
Requisition as to, 245.

CUSTODY OF DEEDS,
Undertaking for, 302.
Who entitled to, 303.
Tenant for life entitled to, 303.

CUSTOM,
Rights acquired by, 209.

DAMAGES,
On re-sale, 118.
For misdescription, 354.
Not recoverable after completion, 354.
Except under condition, 355.
Measure of, in action for fraud of agent, 389.
Now considered in Chancery Division, 457, 479.
Jurisdiction of Court of Chancery as to, 478.
Under Lord Cairns' Act, 478.

DAMAGES—*continued.*
When specific performance impossible by act of defendant, 479.
plaintiff, 479.
Alternative claim for, 479, 493.
Assessment of, 480.
When given in lieu of specific performance, 443, 480.
addition to specific performance, 480.
Not given on rescission, 480.
Action for, in respect of breach of contract, 494.
Expenses recoverable by vendor, 495.
Forfeiture of deposit does not preclude, 495.
By purchaser, 496.
Not given for loss of bargain, 496.
Even when vendor aware of his want of title, 497.
What may be recovered by purchaser, 498.
None where contract invalid, 499.
Under covenant for quiet enjoyment, 513.

DEATH,
How proved, 199.
Of vendor, effect on contract, 273, 449.
Of purchaser, 274, 449.

DEBTS,
Sale by executors for payment of, 145.

DECEIT, ACTION OF,
Against principal for fraud of agent, 386.
For verbal misrepresentations, 393.
Does not lie for false statement of intention, 397.
Or for an omission, 401.
Or for non-disclosure, 402, 408, 502.
Onus of proving falsehood, 401, 501.
non-reliance on statement, 408.
materiality of statement, 504.
Knowledge of purchaser an answer to, 405.
Object of sense, 406.
Lies only for actual fraud, 414, 500, 529.
Fraud must be pleaded, 501.
Verbal statement sufficient, 501.
Parties, 501.
What is a good defence, 504.
Not barred by delay, 505.
When executors may bring, 505.
be sued, 505.

DEEDS,
Condition as to production, 92.
Purchaser's right to, 92, 302.
Retained by vendor, 92.
Handed to largest purchaser, 93.
Production of, 302.
Covenants for, run with land, 226.
Purchaser's right to, 302.
Equitable right, 302.
Acknowledgment, 302.
Undertaking, 302.
By person who retains, 303.
Mortgagees must now produce, 803.
By tenant for life, 303.
Attested copies, 303.
Right to take copies, 304.
Rectification of, 431.
Action for recovery of, 495.
Forgery of, no reconveyance necessary, 531.

DEFECTS,
Patent, need not be mentioned, 349.
Purchaser's knowledge cures misdescription, 349.
Latent, must be mentioned, 350.
Purchaser with notice of, cannot object, 350.
Rescission for non-disclosure of, 411.
In title, discovered after conveyance, 355, 506.
Assessment of compensation for, 356.
In quantity, 356, 365, 367.
Constructive notice of slight, 363.
When vendor can enforce contract with compensation, 365.
refused specific performance, 367.
Industrious concealment, 370.
In the vendor's estate or interest, 372.
Purchaser may take what vendor has, 375.
When refused compensation, 377.

DELAY,
Lessee's rights under contract for purchase not lost by, 51.
Of plaintiff, in specific performance, 461.
Evidence of abandonment, 461.
Breach of essential stipulation, 461.
Amounting to laches, 461.
When fatal, 462.
Time spent in negotiation not counted, 462.
From what time counted, 463.
Not excused by inaction of the other party, 463.
Or continual claim, 463.
Possession an excuse for, 463.
In prosecuting suit, 464.
Payment of purchase-money into Court, 469.
Not an answer to action of deceit, 505.
Effect of, on claim for rescission, 535.

DELIVERY,
Of abstract, 75.
Condition as to, 75.
Time for, 75.
Of deed, 298.

DEMURRER,
Defence of Statute of Frauds formerly raised by, 29.
Secus, since the Judicature Act, 30.

DEPENDENT,
Conditions, 492, 522.

DEPOSIT,
Condition of sale as to, 78, 98, 109.
Auctioneer not liable to pay interest on, 109.
When purchaser can recover from auctioneer, 110.
Relative rights of vendor and purchaser, 111, 114.
Payment of, by cheque, 111.
bill of exchange, 111.
Auctioneer cannot set off debt against, 111.
Interpleader in respect of, 112.
Is both a pledge and a part payment, 114.
Investment of, 114.
Loss of, on whom it falls, 114.
Recovery of, by purchaser, 115, 496.
without interest, if no binding contract, 116.
with interest, if vendor in default, 116.
in what actions, 117.
on the ground of misdescription, 354.
Forfeiture of, 115.
Condition of sale as to, 118.
Does not preclude action for damages, 495.

DEPOSIT—*continued.*
Counter-claim for, 117.
Lien for, 117.
Set-off against deficiency of price on re-sale, 118.
Return of, without interest, 119.
Solicitor receiving, when made defendant, 448.

DEPOSIT OF TITLE DEEDS,
An exception to Statute of Frauds, 29.
Notice to purchaser from absence of deeds, 317.
Effect of Yorkshire Registries Act, 1884..329.

DEPRECIATORY CONDITIONS,
Too short title, 127.
With other property, 127.
What are depreciatory, 128.
By mortgagee, 148.

DESCRIPTION OF PROPERTY,
Contract must contain, 37.
Corrections, 67.
Freehold or copyhold, 67, 371.
Lease or underlease, 68.
Tenancies, 68.
Land tax, 69.
Tithes, 69.
Fines on copyholds, 69.
Covenants in lease, 69, 361.
Mortgages, 70.
Easements, 71.
Rights of way and other rights, 71, 72.
Minerals, 71.
Latent defects, 350. [*And see* MISDESCRIPTION.]
Ambiguous, when a misdescription, 350, 420.
Situation, 359, 370.

DETERIORATION,
In property falls on purchaser, 271.
Ground for ordering purchase-money into Court, 469.
When a bar to rescission, 532.

DIRECTOR,
Signature of minute book may bind company, 19.
Misrepresentation by, 386.

DISCHARGE,
Of written agreement by parol, 421, 517.

DISCLAIMER,
Of bare power of sale, 122.
Of power of sale annexed to estate, 123.

DISPARAGING STATEMENTS, 385, 399.

DOCUMENTS,
Incorporation of, 62.
Acknowledgment and undertaking as to, 302.

DOUBTFUL TITLE,
On matter of fact, or of law, 473.
From uncertainty of general law, 473, 475.
On construction of statute, 475.
private instrument, 476.
Adverse decision, effect of, 476.
Court of Appeal differing as to, from Court below, 476.
On the facts of the case, 476.
Effect of presumptions, 477.

DOWER, 235.
Woman married before Dower Act, 236.
after Dower Act, 236.
After dissolution of marriage, 237.
In gavelkind lands, 236.
Requisition as to, 244.
Who must join to release, 286.
Indemnity against contingent claim to, 353.

DRAFT,
Approval of, where a sufficient memorandum, 21, 22.
Of deed, not notice, 316.

EASEMENTS,
Statement of, in particulars, 71.
Conditions of sale as to, 87.
Conveyance subject to, 87.
Taken by railway company, 171.
Acquired by prescription, 210.
What pass by conveyance, 294.
Over land retained, 294.
land sold, 294.
Should be expressly reserved, 295.
Not disclosed, an objection to title, 374.

ELECTION,
To avoid contract induced by fraud, 415, 525.
Plaintiff put to, in specific performance, 429.

ENFRANCHISEMENT,
Railway company must make, 174.
Title to make, cannot be required, 194.
Regrant of rights of common after, 209.

ENTRY,
By company before purchase, 185. [*And see* POSSESSION, 259.]

EQUITABLE ESTATE,
Purchaser not bound to accept, 166, 282.

EQUITABLE MORTGAGE,
Sale by Court, 162.
When entitled to priority over legal, 337, 338.
Priority among equitable charges, 344.

ESCROW, 298.

ESTOPPEL,
By recital, 287.
Upon whom binding, 288.
Married woman bound by, 288.
Doctrine of equitable, 390.
Does not apply to promises, 398.
Not created by covenants for title in mortgage, 507.

EVICTION,
Covenants for title not broken by wrongful, 510.
By title paramount, when a breach, 510.

EVIDENCE,
Of arbitrators when admissible, 44.
Recitals, 83.
Receipt for rent, 84.
Of title, 195, 245. [*And see* TITLE.]
Admission of parol, 421. [*See* PAROL EVIDENCE.]
Of mistake, must be clear, 427.

EXECUTED AND EXECUTORY CONTRACTS, 515.

EXECUTION OF DEED, 298. [*And see* CONVEYANCE.]

EXECUTOR,
Cannot sell to himself, 136.
co-executor, 136.
Sale by, for payment of debts, 145.
within twenty years, 146.
Persons to convey, 146.
Action of deceit by, 505.
against, 505.
Not in general answerable for torts of testator, 505.
When, can recover for breach of covenants for title, 514.

EXPENDITURE,
By a purchaser in possession, a part performance, 25.
By lessee of purchaser, 27.

EXPENSES,
Of proving title, condition as to, 92.
Of stamping deeds, 92, 309.
Of registering deeds, 92.
Of abstracts, 92, 190.
Conveyancing Act, 1881, as to, 92, 190.

EXPRESS TRUST,
Under Statute of Limitations, 206.

FACT,
Misrepresentation must relate to, 396.
Mistake of, 437.
Mixed questions of, and law, 438.
Money paid under mistake of, 438.

FAIRNESS,
Of contract, 459.

FALSEHOOD,
Onus of proving, 401.
Of partial disclosure, 402.
Wilful, action of deceit for, 502.

FINES,
Statement of, on sale of copyholds, 69.
Misdescription as to, 359.

FINES AND RECOVERIES ACT,
Inrolment under, 301.
Barring of estate tail in freeholds, 301.
in copyholds, 301.

FIRE.
Who liable to loss by, 272.

FIXTURES,
Sales of, not within Statute of Frauds, 8.
Valuation of, 43.
Condition of sale as to, 74.
What are, 74.

FORECLOSURE ACTION,
Sale by Court, 162.

FORFEITURE OF DEPOSIT,
Condition as to, 98.
Not a penalty, 115.
Does not prevent vendor suing for damages, 495.

FORFEITURE OF LEASE,
Evidence of waiver of, 85.
Relief against, 85.

FORGERY,
No reconveyance necessary, 531.

FORGETFULNESS,
No excuse for misrepresentation, 390, 405.

FORMAL AGREEMENT,
reference to, does not prevent contract being complete, 60.
secus if made subject to preparation of, 61.

FRAUD,
Takes a case out of Statute of Frauds, 24.
Whether part-performance depends on, 25.
Of arbitrator, a ground for setting aside award, 45.
Of auctioneer, 114.
Prevents time running, 206.
Of agent rebuts presumption of notice, 324.
justifies rescission, 386.
liability of principal, 388.
liability of agent, 389.
Effect of, on contracts, 349, 413.
A bar to specific performance, 364.
Of solicitor, 389.
May consist of acts as well as words, 394.
Concealment, 394.
Clear proof of, to set aside executed contract, 395.
Legal and moral, 402.
Reckless statements equivalent to, 404, 503.
Silence may be, 404.
Imputed to one who is bound to know the truth, 404.
Rescission of contract for, 530.
Suppressio veri, 408.
A personal bar to relief, 413.
Contract induced by, voidable not void, 413, 525, 530.
Actual or imputed, 413.
Remedy lost by laches or delay, 414.
Term omitted by, 423.
introduced by, 424.
Action of deceit for, 500. [*See* DECEIT, ACTION OF.]
Assertion of what is not known, is, 502.
Rescission of contract for, 519, 529. [*See* RESCISSION.]
In what cases executed contract rescinded without, 527.

FRAUDS, STATUTE OF,
What contracts are within, 1.
Part of *lex fori*, not of *lex loci*, 2.
Interests in land, what are, 3.
Collateral agreements, how affected by, 13.
Signature of the agreement, 15.
Memorandum or note, what is sufficient, 20.
Exceptions from, 23.
Executed contracts, 23.
Fraud, 24.
Part performance, 25.
Equitable mortgage by deposit, 29.
Lien for purchase-money, 29.

FRAUDS, STATUTE OF—*continued.*
How pleaded, 29, 456.
Effect of admissions, 30.
Names of parties, 33.

FRAUDULENT CONVEYANCES,
Intention, 218.
Settlement, cloak for retaining benefit, 219.
for valuable consideration, 219.
of leaseholds, 219.
Creditors' deed, 219.
Under the Bankruptcy Act, 220.
Fraudulent preference, 220.

FRAUDULENT PREFERENCE,
Avoids deed, 220.

FREEBENCH, 237.

FREEHOLD,
Described as copyhold, 67, 371.

FRUCTUS INDUSTRIALES,
Sales of, not within Statute of Frauds, 7.
May be seized by the sheriff, 7.

FURTHER ADVANCES,
Made after notice of sale, by mortgagor, 313.
Tacking of, 339.

FURTHER ASSURANCE,
covenant for, 513. [*See* COVENANTS FOR TITLE.]

GAME,
Right to kill and take, a *profit à prendre*, 11.

GLEBE LAND,
Purchase by rector, 138.

HARDSHIP,
Compensation refused on the ground of, 379.
Specific performance refused on the ground of, 418, 458, 460.

HEDGES AND DITCHES,
To whom they belong, 293.

HEIRLOOMS,
Sale of, by tenant for life, 144.

HIGHWAY,
Right to, gained by public use, 210.
Soil of, passed by conveyance, 292.

IDENTITY OF PROPERTY,
Condition as to, 86.
Statutory declaration, 87.
How proved, 199.

IMPROVEMENTS,
Purchaser's lien for, on failure of title, 260, 261.
Purchase-money not ordered into Court on account of, 469.
Allowance for, on rescission, 533.

INADEQUACY OF PRICE,
May be so great as to justify rescission, 458.
Must amount to evidence of fraud, 458.
As a defence to specific performance, 459.
Not regarded on sale by auction, 459.
Coupled with oppression, 459.

INCAPACITY,
When a defence to specific performance, 454.
Mental, regarded in equity, 458.

INCORPORATION OF DOCUMENTS,
Agreement may consist of several writings, 62.
What documents may be incorporated, 62.
How far parol evidence admissible, 63.
Reference to incorporated document, 64.
Relating to the same transaction, 64.
By indorsement, 64.

INCUMBRANCES,
Statement of, in particulars, 70.
Power for tenant for life to transfer, 145.
Discharged, should be abstracted, 192.
Remedy after completion, 355.
Concealment of, by solicitor, 389.
On real estate, independent of notice, 392.
Covenant against, 512. [*See* COVENANTS FOR TITLE.]

INDEFINITE STATEMENTS,
Do not amount to misdescription, 369.
misrepresentation, 398.

INDEMNITY,
By purchaser of lease, 91.
Purchaser not compelled to take, 353.
Nor vendor to give, 353.
Unless it forms part of the contract, 353.

INFANT,
Sale by trustees for, under Settled Land Act, 142.
No specific performance against, 455.
Cannot obtain specific performance, 455.

INFANTS' RELIEF ACT, 1874..455.

INITIALS,
A sufficient signature, 19.

INJUNCTION,
To restrain arbitrator from acting, 45.
acts inconsistent with representation; 390.
acts of ownership by purchaser, 470.
conveyance to third person by vendor, 470.
vendor from obstructing valuers, 471.
As to user of land not a breach of covenant for quiet enjoyment, 511.
Right to, not enlarged by covenants for title, 512.

INSURANCE,
Who entitled to benefit of, 272.

INTENTION,
Statement of, not misrepresentation, 397.

INTEREST,
Condition as to payment of, 96.
Rate, 97, 258.
Appropriation of purchase-money, 87, 258.
When deposit recoverable with, 116.
Runs from time for completion, 257.
When good title shown, 257.
When possession taken, 258.
On sale of reversion, 258.
Income tax deducted, 258.
When purchaser can recover, 499.
Allowed on rescission, 533.

INTERESTS IN LAND,
What are, within Statute of Frauds, Ch. I., s. 2.
Agreement for a lease, 3.
Lease, 3.
Surrenders, 5.
Lodgings, 5.
Tenancy from year to year, 5.
Produce of the soil, 6.
Fixtures, 8.
Licences, 9.
Land held for partnership purposes, 11.
Shares in companies, 12.
Rent, 13.

INTERPLEADER,
By auctioneer, 112.
Deduction of charges and costs, 112.

INTOXICATION,
A defence to specific performance, 457.
Not a ground for rescission, 457.

JUDGMENT,
On admissions in pleadings, 466.
Form of, in specific performance, 471.
when title accepted or established, 471.
account of rents and profits, 471.
reference of title, 472. [*See* REFERENCE OF TITLE.]

JURISDICTION OF COURT,
Not to be questioned, 163.
In specific performance, 441.
As to damages, 478.

KNOWLEDGE,
Of defect cures misdescription, 349, 361.
Unless it can be removed, 374.
Effect of express contract to make a good title, 374.
Purchaser misled by, of premises, 360.
Assertion of, when fraudulent, 398, 502.
Actual fraud may exist without, 403.
Of the truth, cures misrepresentation, 405.
Means of, not an answer to action of deceit, 504.

LACHES,
Remedy for fraud lost by, 414.
When delay amounts to, 461.
Rescission barred by, 535.

LAND,
What interests in, come within Statute of Frauds, 3—13.
Specific performance of agreements as to, 441.

LAND TAX,
Statement of, in particulars, 69.
Incidence of charge, misdescription of, 359.

LANDS CLAUSES ACT, SALES UNDER,
What lands may be taken, 171.
Easements, 171.
Minerals, 172.
Part of house, 173.
Garden, 173.
Less than half an acre, 174.
Copyholds, 174.
Common lands, 174.
Outstanding interests, 175.
Purchase by agreement, 176.
With absolute owner, 176.
With trustees, 176.
With persons under disability, 176.
With tenant for life, 177.
Ascertainment of purchase-money, 177.
Valuation, 178.
Sale for rent-charge, 178.
Interest, 178.
Payment by instalments, 179.
Time for completion, 179.
Relative positions of vendor and company, 179.
Costs of contract, 180.
Making out title, 183.
Of conveyance, 184.
Compulsory taking, 180.
Notice to treat, 180—182.
Mandamus to proceed, 181.
Specific performance, 181.
Withdrawal of notice, 182.
Ascertainment of price, 182.
Payment into Court, 183.
Conveyance, 183.
Where owner refuses to convey, 183.
Execution of, before recovery of price, 493.
Entry on lands before purchase, 185.
Compensation for injury, 186.
for easements, 186.
for damage caused by user, 186.
Sale of superfluous lands, 187.
Must be without reservation, 187.
Costs of arbitration under, 494.

LATENT AMBIGUITY,
May be explained by parol evidence, 422.

LATENT DEFECTS. [*See* DEFECTS.]

LAW,
Misrepresentation as to, 396.
And fact, statements of, distinguished, 396.
Mistake of, 437.
Mixed questions of, and fact, 438.
Money paid under mistake of, 439.

LEASE,
Writing, when required, 3.
When to be under seal, 4.
Void, construed as an agreement, 4.
Action, when maintainable under, 5.
Entry and payment of rent under, 5.
Commencement must be specified in agreement, 33, 46.
Contract for, must specify all material terms, 46.
Option of purchase in, 48.
Covenant for renewal, 50.
Compensation for deficiency in area, 356.
in length of term, 356.
Misdescription in particulars, 361.
Constructive notice of contents, 362.
Occupation of tenant not notice of, 363.

LEASEHOLDS,
Description of, in particulars, 68.
Purchaser need not accept underlease, 68.
Part of premises comprised in lease, 61.
Unless he has notice of facts, 68.
Covenants in lease need not be stated, 69.
But should be open to inspection, 69.
Constructive notice, 362.
Covenants described as "usual," 70.
Usual and unusual covenants, 70.
Not valuable consideration under 13 Eliz., 219.
Valuable consideration under 27 Eliz., 222.
Compensation for misdescription, 356.
Sale in lots, 362.
Sold as freehold, 370.

LEAVE TO BID,
Given to trustee for sale, 136.
to mortgagee, 153.
On sale by Court, 164.
Puts an end to fiduciary relationship, 410.

LEGAL ESTATE,
Purchaser entitled to, 166, 282.
Outstanding in infant on sale by Court, 166, 282.
Vesting order, 168, 283, 285.
Person to execute conveyance, 168.
Power to get in sufficient, 192.
Outstanding, barred, 205.
Devolution of, 284.
Protection afforded by, 335. [*See* NOTICE.]
Person best entitled to call for, 336, 345.
Not divested by cancelling conveyance, 435.

LEGAL FRAUD. [*See* FRAUD.]

LEGAL MORTGAGEE,
When postponed to equitable, 337, 338.

LEGAL PERSONAL REPRESENTATIVES. [*See* EXECUTOR.]
Entitled to lessee's option of purchase, 274.
Legal estate devolves on, of trustee, 284.

LESSEE,
May maintain action on collateral parol agreement, 14.
Payment of increased rent by, evidence of a new contract, 27.
Option conferred on, to purchase, 48, 274.
to renew, 50.
False statement of name, on sale of reversion, 359, 372.

LETTER,
When a sufficient memorandum in writing, 21.
Acceptance by, of previous offer, 54.
when contract complete, 56.
Lost in the Post Office, contract unaffected, 57.
Contract by, 57.

LICENCE,
A void contract may operate as, 8.
Confers no interest in the soil, 9.
When revocable, 10.
Excuses a trespass, 10.
Coupled with an interest must be created by deed, 10.
To assign may be obtained after action, 492.

LIEN,
Purchaser's, for deposit, 117, 261.
When in default, 261.
To what it extends, 261.
As against subsequent incumbrancers, 262.
Sub-purchaser's, 262, 534.
Vendor's, for purchase-money, 263.
When it arises, 263.
Over what property, 263.
In respect of what purchase-money, 264.
For annuity, 264.
How affected by covenant to pay, 264.
Against whom it prevails, 266.
purchaser with notice, 266.
without notice, 266.
cestuis que trust, 267.
In Yorkshire, 267.
How lost, 267.
Substitutional security, 268.
How enforced, 268.
Barred by Statute of Limitations, 268.
Locke King's Acts, 269.
On sale to railway company, 270.

LIFE ESTATE,
Difference between, and fee simple may be valued, 357.
Purchaser not compelled to take with compensation, 372.

LIGHT,
Right to, reserved on sale, 72.
Ancient, 215. [*And see* PRESCRIPTION ACT.]

LIMITATIONS, STATUTE OF,
Mortgages within, 151.
Charities within, 156.
Title under, 201.
Forced on purchaser, 201.
Right extinguished, 201.
Successive occupiers, 202.
Possession by coparceners, 202.
agent, 203.
Copyhold tenure extinguished, 203.
Tenant holding over, 203.
Disabilities, 203.
Remainderman barred, 203.
Possession by mortgagee, 203.
mortgagor, 204.
Payment of interest, 204.
Remedy on covenant barred, 204.
Legal estate outstanding, 205.

LIMITATIONS, STATUTE OF—*continued.*
Arrears of rent and interest, 205.
Express trust and fraud, 206.
Runs only from discovery of mistake, 439.
fraud, 535.

LIQUIDATED DAMAGES,
Recovery of, after re-sale, 118.

LIQUIDATORS,
May sell by auction, or private contract, 100.

LOCKE KING'S ACTS, 269.
Death of purchaser before completion, 274.

LODGINGS,
Agreement to let must be in writing, 5.

LOST DOCUMENTS,
Secondary evidence as to, 196.

LOTS,
Distinct contracts on sale in, 99, 368.
Fiduciary vendors may sell in, 100.
Sale of leaseholds in, 362.
Failure of title to one of several, 368.
Purchaser's mistake as to, 418.
Mistake in conveyances, 435.

LUNACY,
Of vendor, 274.
Of purchaser, 274.
A defence to specific performance, 454.

LUNATIC,
Tenant for life, sale by, 142.
Execution of deed by committee, 300.

MANDAMUS,
To compel company to proceed, 181.

MANOR,
Misdescription of fines, 359.

MANSION-HOUSE,
Sale of, by tenant for life, 144.

MANUFACTORY,
Purchase of, under Lands Clauses Act, 174.

MAP. [*See* PLAN.]

MARRIAGES,
How proved, 199.

MARRIED WOMAN,
Tenant for life, sale by, 142.
Acknowledgment of deed by, 300.
Concurrence of husband when necessary, 300.
To pass legal estate, 300.
Can sue and be sued as feme sole, 455.

MARRIED WOMEN'S PROPERTY ACT, 1882..300, 301.

MARSHALLING,
For lien of unpaid vendor, 269.

MEANS OF KNOWLEDGE,
Not an answer to misrepresentation, 407.

MEASURE OF DAMAGES,
On failure of title, 497.
On breach of covenants for title, 513.

MEMORANDUM OR NOTE,
What sufficient to satisfy the Statute of Frauds, 20.
Receipt for purchase-money, 21.
Letter containing admissions, 21.
Approval of draft conveyance, 21, 22.

MERGER,
Of articles in deed, 354.

MIDDLESEX,
Registration of deeds, 325.
will, 330.

MINERALS,
Reservation of, in particulars, 71.
on sale of copyholds, 71.
on sale by trustees, 129.
on sale by tenant for life, 144.
in conveyance, 291.
On sale to railway company, 172.
Concealed working of, gives no title, 206.
Pass by conveyance, 292.
What included in term, 293.

MINING COMPANY,
Shares in, not an interest in land, 12.

MINUTE BOOK,
Signature of director to entry in, 16, 19.

MISDESCRIPTION,
Distinguished from misrepresentation, 349, 382.
Knowledge of purchaser cures, 349, 361.
Latent defects, 350, 369.
Ambiguity may amount to, 350.
Effect of, on the contract, 351.
Recovery of deposit, 354.
Action for damages, 354.
Condition as to, remedy after completion, 355.
Incumbrances not covered by, 355.
Or defects in title, 355.
Assessment of compensation for, 356.
Of situation of property, 359, 370.
Of length of term, 360.
Of quantity, 361, 367.
Effect of words "more or less," 361.
Specific performance at suit of vendor, 365.
Not enforced when defect considerable, 367.
Indefinite statements do not amount to, 369.
Of tenure, 370.
Leasehold as freehold, 370.
Copyhold as freehold, 371.
Freehold as copyhold, 371.
Of tenancies, 372.
Of vendor's interest,
Life estate or reversion not the fee, 372.
Undivided share not the entirety, 372.
Underlease not a lease, 373.
Derivative lease not a lease or underlease, 373.
Undisclosed rights or easements, 374.
Restrictive covenants, 374.
Rescission for serious, 522.

MISLEADING CONDITIONS, 82.
Give the purchaser the right to rescind, 419.
Burden of proof lies on vendor, 420.

MISREPRESENTATION,
Distinguished from misdescription, 382.
Not necessarily fraudulent, 384.
By vendor, 384.
By purchaser, 385.
By agent, 385.
Purchase of shares induced by, 386.
By third person, 389.
By trustee, 390.
May be made verbally, 393.
Person to whom statement is made, 394.
Before or at the time of the contract, 395.
Must relate to matter of fact, 396.
Not matter of law, 396.
Or belief or opinion, 396.
Or intention, 397.
Of tenure, 397.
Of title, 397.
Indefinite, not a defence to specific performance, 398.
Simple commendation, not, 399.
As to value, no action lies, 399.
Secus, as to rental, 400.
Or profits, 400.
Or fact of valuation, 400.
Falsehood of the statement, 401.
Reliance on the statement, 405.
Cured by knowledge of real facts, 405.
Not by constructive notice, 406.
Or by resort to other means of knowledge, 407.
A bar to specific performance, 413.
Innocent when statement is, 414.
Rescission of contract for, 519. [*See* RESCISSION.]

MISTAKE,
Common to both parties, 417.
Estate tail barred, 417.
Non-existent subject-matter, 417.
Reversion fallen into possession, 417.
Purchase of a man's own estate, 417.
Rescission on the ground of, 520, 528.
Of one party, in general disregarded, 418.
Exceptions to the rule, 418.
Contract not enforced on account of hardship, 418.
Or when mistake induced by other party, 419.
Admission of parol evidence, 421—428. [*See* PAROL EVIDENCE.]
Term omitted by, 423.
introduced by, 424.
In reducing agreement into writing, 424.
Evidence must be conclusive, 427.
Procedure in cases of, 429.
Rectification, 430. [*See* RECTIFICATION.]
Setting aside conveyance for, 434.
Of fact and law, 437.
Statute of Limitations, 439.
Rescission of contract for, 520.
After conveyance, 528.

MONEY HAD AND RECEIVED,
When purchaser can bring action for, 499.
Interest not recoverable, 499.
Recoverable on rescission, 524.

MORAL FRAUD. [*See* FRAUD.]

"MORE OR LESS,"
Effect of, in description, 361.

MORTGAGE,
Statement of, in particulars, 70.
Authorized by power of sale, 130.
by charge of debts, 147.
Kept on foot by purchaser, 281.
Re-conveyance of, 282, 284.
Devolution of estate on death of mortgagee, 124, 283.
Tacking of, 338. [*And see* TACKING.]
Consolidation of, 342. [*And see* CONSOLIDATION.]

MORTGAGEE,
To what extent a trustee, 147, 151.
Improper sale by, 148.
Depreciatory conditions, 148.
Sale by first and second, 148.
Sale under Conveyancing Act, 148.
Surplus money in hands of, 150.
May enforce all his remedies, 151.
Tender of amount due, 151.
Sale by transferee, 152.
Sale by legal personal representative, 152.
Cannot sell to himself, 152.
Leave to bid, 153.
Purchasing from mortgagor, 153.
Selling to second mortgagee, 153.
Bound to produce deeds, 303.
Acknowledgment as to deeds, 303.
Not bound to disclose his mortgage to purchaser, 392.
Postponed, if he encourages subsequent advance, 393.
Not bound to convey so as to open foreclosure, 424.
Not a proper party to action for specific performance, 444.
Lease by, contract enforced against mortgagor, 446.

MORTMAIN ACT,
Restrictions imposed by, 158.
Inrolment under, 301.

NAMES OF PARTIES,
In written agreement, 33.
Ascertained by extrinsic circumstances, 34.

NEGOTIATION,
Whether letters amount only to, 58.
Time spent in, not counted as laches, 462.
Right to rescind lost by, 524.

NOTICE,
Of tenancies in particulars, 68.
Before sale by trustees, 126.
Of breach of trust, purchaser with, 136.
By tenant for life to trustees, 143.
By mortgagee to mortgagor, 149.
to heirs and assigns, 149.
To treat under Lands Clauses Act, 180.
Withdrawal of, 182.
Of voluntary settlement, 221.
Of restrictive covenants, 229.
[*And see* COVENANTS, RESTRICTIVE.]

NOTICE—*continued.*
Purchase with,
Fraud, ground of doctrine, 311.
Actual and constructive, same result, 312.
Purchaser with notice from purchaser without, 312.
Before payment of purchase-money, 312.
conveyance, 312.
Conveyancing Act, 1882, as to, 312.

Actual Notice,
In same transaction, 313.
Statements by strangers, 313.
Witnessing a deed not notice of contents, 313.
Further advances to vendor after sale, 313.
Public Acts of Parliament, 314, 361.
Private Acts, 314.

Constructive Notice,
Meaning of, 314.
From contents of documents, 314.
Notice of deed, notice of whole contents, 315.
though inaccurately recited, 315.
Post-nuptial settlement and ante-nuptial articles, 315.
Notice of true construction, 315.
interests of parties, 315.
covenants in lease, 316, 362.
invalidity of charity lease, 316.
incumbrances, 316.
Notice from irregularities in deed, 316.
unusual place of receipt, 316.
deeds not directly connected, 316.
collateral circumstances, 316.
draft, 316.
abstract, 317.
Absence of deeds, 317.
notice of vendor's lien, 317.
prior incumbrance, 317.
excuses for non-production, 317.
insufficient, 317.
sufficient, 318.
document which may affect title, 319.
must affect title, 319.
Physical condition of property, 320.
Tenancies, 49, 320.

Notice through an Agent,
Knowledge imputed to principal, 321.
Actual to agent is actual to principal, 321.
Must be in same transaction, 322.
connected transactions, 322.
Solicitor not agent generally for receiving notices, 322, 345.
Same solicitor for both parties, 323.
Solicitor merely to obtain execution, 323.
Fraud of solicitor rebutting presumption, 324.

Notice in Register County,
Middlesex, 325.
Yorkshire, 326.
Must be actual, 326, 327.
Except where deeds are deposited without memorandum, 329.
Memorandum necessary in Yorkshire, 329.
Registration after notice of unregistered deed, 329.
Purchaser from person who has not registered, 330.
Registration of wills in Middlesex, 330.
in Yorkshire, 330.
of affidavit of intestacy, 331.

NOTICE—*continued.*
Purchase for Value without,
Value of the defence, 332—334.
as against legal estate, 332.
prior equity, 334.
Protection afforded by legal estate, 335.
"The law shall prevail," 335.
Legal estate acquired by fraud, 335.
honestly acquired, 335.
where deeds are forged, 335.
afterwards acquired, 336.
acquired from trustee, 336.
person best entitled to call for, 336.
Legal mortgagee who makes no inquiry after deeds postponed, 337.
Unless reasonable excuse for non-production, 337.
Legal mortgagee parting with deeds to mortgagor postponed, 337.
Unless for reasonable purpose, 337.
Or unless subsequent mortgage is forged, 337.
Legal mortgagee guilty of fraud postponed, 338.
Tacking of mortgages, 338. [*And see* TACKING.]
Consolidation of mortgages, 342. [*And see* CONSOLIDATION.]
Priority among equitable interests, 344.
Qui prior est tempore, 344.
Priority lost by neglect, 344.
Mortgagee with some only of deeds, 344.
no deeds, 344.
parting with deeds to mortgagor, 345.
Notices to trustees, 345.
in respect of personal estate, 345.
realty converted, 345.
to solicitor of trustees not sufficient, 345.
Best right to call for legal estate, 345.
Receipt indorsed by building society, 346.

NUISANCE,
When vendor bound to mention, 370.

OBJECTIONS, 242. [*And see* REQUISITIONS.]

OCCUPATION,
Reference to, in conveyance, 291.
By adverse claimant, a bar to specific performance, 371.

OCCUPATION RENT,
Purchaser when liable for, 260.
Vendor when liable for, 260.
Purchaser fixed with, on rescission, 533.

OFFER,
Binding contract by acceptance of, 54.
In writing, may be accepted by parol, 54.
Acceptance must be unqualified, 54.
Qualified acceptance is a fresh offer, 55.
How withdrawn, 55, 56.
By telegram requires prompt reply, 56.
Not assignable, 57.
Once rejected, cannot be revived, 57.

OMISSION,
Is not misrepresentation, 401.
Defendant may prove by parol evidence, 423.
Deliberate, no defence, 425.

OPEN CONTRACT,
Trustees may not enter into, 127.
Forty years' title must be shown, 193.
Exceptions, 193.
Root of title, 193.
Proof of title, 195.

OPENING,
Biddings, 165.

OPERATIVE WORDS,
"Grant," 288.
"Heirs," 289.

OPINION,
Matter of, not misrepresentation, 396.

OPTION,
Of purchase,
Conversion of property by, 47, 48.
By will, 47.
When trustees are to fix price, 47.
Conditions must be strictly complied with, 47, 278.
In lease, 48, 273.
In partnership articles, 52.
Unlimited, void as a perpetuity, 52.
Under Lands Clauses Act, 53.
Trustees cannot give, 130.
Of renewal,
Once, or *toties quoties*, 50.
Covenant conferring, how construed, 50.
Conditions precedent must be satisfied, 51.
Delay, effect of, 51.
Who can exercise, 52.

OUTGOINGS,
Discharged by vendor up to completion, 96.
What included under, 96.
Current rent, 96.
Street improvements, 96.

OWNERSHIP,
Acts of, purchaser must pay money into Court, 469.

PARCELS,
Description of property, 291.
Ambiguous description, 291.
Reference to occupation, 291.
Minerals, 291.
Soil of highway, 292.
private way, 292.
stream, 292.
roadside strips, 292.
Allotments, 293.
Hedges and ditches, 293.
Way of necessity, 293.
"Together with all ways," &c., 293.
Easements, reservation of, 294.
grant of, 295.
General words, 295.
Estate clause, 295.

PAROL CONTRACT,
Effect of Statute of Frauds, 2.
Executed, will support promise to pay, 13, 23.
Part performance, 25—28.

PAROL EVIDENCE,
To prove misrepresentation, 394.
Not received to vary written agreement, 421.
Rejected on behalf of plaintiff, 422.
except to explain latent ambiguity, 422.
where variation part performed, 423.
to rebut an equity, 423.
Different positions as to, of plaintiff and defendant, 423.
Admitted for defendant to prove
Omission, 423.
Introduction of new term, 424.
Mistake in written agreement, 424.
Contemporaneous agreement, 425.
Not admitted when term deliberately omitted, 425.
Or to alter nature of contract, 426.
To discharge written agreement, 427.

PAROL VARIATION OF WRITTEN AGREEMENT,
Not enforceable, 421.
Unless part performed, 423.
Defendant may set up, 423, 425.
Contemporaneous, 425.
Subsequent, 426.
Time and title, exceptions to the rule as to, 428.

PART OF A HOUSE, 173.

PART PERFORMANCE,
Takes a parol contract out of Statute of Frauds, 25.
Delivery of possession is, 25.
Wrongful possession is not, 26.
Whether possession of tenant is, 26.
Expenditure of money by lessee, 27.
Payment of purchase-money not an act of, 27.
increased rent evidence of new tenancy, 27.
Introductory or ancillary acts not a, 27.
Does not exclude the necessity of proving terms, 28.
Where remainderman bound by acts of, 28.
Doctrine of, applies to corporations, 28.
Of parol variation, 423.

PARTICULARS OF SALE,
Preparation of, 66.
Construed in favour of purchaser, 66, 67.
First and second editions, 67.
Description of the property, 67.
Tenure, 67.
Freehold or copyhold, 67.
Lease or underlease, 68.
Tenancies, 68.
Land tax and tithes, 69.
Fines on copyholds, 69.
Covenants in lease, 69.
Usual and unusual, 70.
Incumbrances, 70.
Easements, 71.
Rights of way, &c., 71, 72.
Minerals, 71.
Light, 72.
Plan of the property, 72.

PARTIES TO ACTION,
For specific performance,
Mortgagees not necessary, 445.
Parties to conveyance, 445.
Adverse claimants, 445.
Sub-purchasers, 446.
Beneficiaries under voluntary settlement, 445.
Contracts under powers, 447.
Agents, 447.
Auctioneers, 447.
Assignees, 448.
Of deceit, 501.

PARTIES TO AGREEMENT,
Must be named or described, 33.
Sufficient and insufficient descriptions, 34.
"Proprietor" a sufficient description, 34.
"Vendor" not a sufficient description, 35.

PARTIES TO CONVEYANCE,
Legal estate must be conveyed, 146, 282.
Vesting order, 283, 285.
Trust estate, 283, 284.
Mortgage estate, 283, 284.
Person appointed to convey, 286.
Satisfied terms, 286.
Mortgagor not necessary party on sale by mortgagee, 286.

PARTITION ACT, SALE UNDER,
Property not admitting of partition, 159.
At request of persons interested in a moiety, 159.
Where Court thinks fit, 160.
Where trustees have power of sale, 161.
Where there is a trust for sale, 161.
Where time for sale is specified in trust, 161.
Service on persons interested dispensed with, 162.

PARTNERSHIP PURPOSES,
Land held for, not within Statute of Frauds, 11.

PATENT AMBIGUITY,
Parol evidence not admissible to explain, 423.

PATENT DEFECTS. [*See* DEFECTS.]

PAYMENT,
Of money not an act of part performance, 27.
Of purchase-money into Court, 467.
When purchaser in possession and title admitted, 467.
possession taken without consent although title disputed, 467.
possession taken under the agreement, 468.
Election to pay or give up possession, 468.
Acts of ownership by purchaser, 469.
Ordered only on admissions, 469.
Evidence required between vendor and purchaser, 470.
Time given to purchaser, 470.

PENALTY,
Forfeiture of deposit not a, 115.

PENCIL,
Signature in, good, 20.

PERPETUITY,
Unlimited option of repurchase, 52.

PERSONAL REPRESENTATIVE,
May exercise option of purchase, 52.

PLAN,
Annexed to particulars, 72, 360.
Of intended roads, 88.
In conveyance, 291.

PLEADING,
In specific performance, 450.
Contract by letters, 451.
Statute of Frauds, 456.

POSSESSION,
Where part performance, 25.
Notice of tenant's rights, 49.
Precludes objection of delay, 51, 463.
Waiver by taking, 249.
Purchaser's right to, 259, 363, 371.
What amounts to, 259.
Pending investigation of title, 259.
After rescission of contract, 259.
After failure to make out title, 259.
Abandonment of, time counts from, 464.
Payment into Court by purchaser in, 467.
when title admitted, 467.
where possession taken without consent, 467.
where he deals with the property as owner, 468.
By purchaser does not prevent rescission, 532.

POST OFFICE,
Contract complete, though letter lost by, 57.

POWER,
Contract amounting to fraud on, not enforced, 381.
Specific performance of contract under, 447.

POWER OF SALE,
Contrasted with trust, 121.
Bare power and power annexed to estate, 121.
Bare power does not survive, 121.
Power annexed to estate survives, 122.
Disclaimer of power, 122, 123.
After death of all the trustees, 123.
To "my trustees," 122.
To trustees to preserve contingent remainders, 122.
To heirs and assigns of survivor, 123.
To heirs of survivor, 123.
To trustees for time being, 124.
Exerciseable by new trustees, 125.
[*See also* TRUSTEES, SALE BY.]

PRE-EMPTION. [*See* OPTION.]

PRESCRIPTION ACT,
Title under, 207.
of common and profits *à prendre*, 209.
Custom, 209.
Rights of way and easements,
highway, 210.
private way, 210.
watercourses, 211.
natural stream, 212.
subterraneous water, 213.
artificial stream, 213.
right to discharge water, 213.

PRESCRIPTION ACT—*continued.*
Right of support to land, 214.
houses, 214.
Right to light, 215.
ancient lights, 215.
amount of light, 216.
town and country, 217.
alterations in windows, 217.

PRESUMPTION,
When title doubtful in cases of, 477.
Of conveyance, 477.

PRICE,
An essential term of contract for sale, 38.
How fixed, 38.
Valuation and arbitration, 40.
Inadequacy of, 458.

PRINCIPAL,
Contract on behalf of undisclosed, 36.
When liable for fraud of agent, 388.

PRINTED NAME,
Whether a sufficient signature, 20.

PRIORITY, 332. [*See* NOTICE *and* EQUITABLE MORTGAGE.]

PRODUCE OF THE SOIL,
Contracts for sale of, 6.

PRODUCTION OF DOCUMENTS,
To verify title, 195.
Proper custody, 195.
Secondary evidence, 196.
Wills, 198.
Covenants for, run with land, 226.
Acknowledgment and undertaking, 302.
[*And see* DEEDS, PRODUCTION OF.]

PROFITS,
False statement as to, avoids contracts, 400.
Promoters cannot retain, 410.

PROMOTERS,
Stand in fiduciary position towards company, 410.

PROOF OF TITLE. [*See* TITLE, PROOF OF.]

PROPRIETOR,
A sufficient description of vendor, 34.

PROTECTION OF PURCHASER,
Under Settled Land Act, 145.
On sale by mortgagee, 150.
On sale by Court, 163.

PUBLIC AUCTION OR PRIVATE CONTRACT,
Trustees may sell by, 127.
Tenant for life may sell by, 143.

PUBLIC-HOUSE,
Covenant not to keep, 233.
to buy beer, 234.
Time essential on sale of, 277.

PUFFER,
Employment of, at auction, 106.
Rules of law and equity formerly differed, 106.
Provisions of Sale of Land by Auction Act, 1867..106.
When sale avoided by employment of, 107.

PUFFING STATEMENTS,
Disregarded by Court, 369.
Do not amount to misrepresentation, 385, 399.

PURCHASE-MONEY,
Payment of, not a part performance, 27.
Payment into Court under Settled Land Act, 145.
by mortgagee, 151.
on sale of charity land, 156.
on sale by Court, 166.
Payment to trustees of settlement, 145.
Appropriation of, 258.
Receipt for, 289. [*And see* RECEIPT.]
Apportionment of, 308.
When ordered into Court, 467.
Action for, 492.
Whether vendor can recover, or only damages, 494.
No intention of paying, right to rescind, 519.
Repayment of, on rescission, 533.

PURCHASER'S LIEN FOR PURCHASE-MONEY,
Exception from Statute of Frauds, 29.

QUIET ENJOYMENT,
Covenant for, 510. [*See* COVENANTS FOR TITLE.]

QUIT RENTS,
Subjects of compensation, 366.

RAILWAY COMPANY,
Purchase by, 170. [*And see* LANDS CLAUSES ACT.]

READY AND WILLING,
Plaintiff should aver that he is, to perform his part, 492.

RECEIPT,
Of purchase-money,
By mortgagees, 150.
By trustees, 145, 290.
Of solicitor, 290.
Of solicitor to trustees, 290.
In body or indorsed, 290.
For rent,
Evidence of performance of covenants, 84.
Waiver of forfeiture, 85.

RECITALS,
When evidence, 83, 197, 200.
Condition as to, 83.
Inaccurate, 84.
What recitals should be used, 287.
Of seisin, 287.
Operative words controlled by, 287.
Estoppel by, 287.
Upon whom binding, 288.
Married woman bound by, 288.
Incorrect, person need not execute, 288.

RECKLESS ASSERTIONS,
When fraudulent, 402, 404.
Action of deceit for, 503.

RE-CONVEYANCE,
When necessary on rectification, 434.

RECOVERY OF DEPOSIT,
When no binding contract, 116.
When vendor in default, 116.
In what actions, 117.

RECTIFICATION,
Of instruments not contracts, 430.
Of deed, 431.
Jurisdiction in cases of mistake, 432.
Mistake in parcels, 432.
Of conveyance, when ordered, 433.
Evidence, 433.
Mistake must be mutual, 433.
Except when relief is a partial rescission, 434.
Agreement must be concluded, 434.
Re-conveyance, when necessary, 434.
Of settlements, 436.
Or rescission, alternative claim for, 529.

RECTOR,
Purchase by, of glebe land, 138.

REDEMPTION,
Sale in action for, 162.

REFERENCE OF TITLE,
When directed before hearing, 472.
at hearing, 472.
Purchaser may generally insist on, 472.
What title must be shown, 472.
Special directions, 473.
When title first shown, 477.
Costs of, 484.

REFUSAL,
To complete, what damages for, 497.

REGISTER COUNTIES,
Notice in, 325. [*See* NOTICE.]

REGISTRATION,
In Middlesex, 325.
In Yorkshire, 326.
Of will, 330.
Affidavit of intestacy, 331.

RELIANCE,
On statement of vendor, 405.

REMAINDERMAN,
When bound by acts of part performance, 28.

RENEWAL, COVENANT FOR,
Effect of, in lease, 50.
Whether perpetual, a question of construction, 50.
Court leans against construing, as perpetual, 50.
Conditions precedent must be strictly satisfied, 51.
Effect of delay, 51.
After original term has expired, 52.
Who entitled to benefit of, 52.

RENT,
Arrears of, are personalty, 13.
Future, is an interest in land, 13.
Agreement for abatement of, within the Statute of Frauds, 13.
Payment of increased, evidence of new tenancy, 27.
Apportionment of, 90.
On sale of leaseholds, 90.
reversion, 90.
Receipt for, evidence of performance of covenants, 84.
Receipt of, waiver of forfeiture, 85.
Compensation for over-statement of, 358.
False statement of, vitiates contract, 400.

RENT-CHARGES,
Should be mentioned in particulars, 70.
Apportionment of, 90.
Sales to railway companies for, 178.
Compensation for undisclosed, 358, 366.

RENTS AND PROFITS,
Purchaser entitled to, 259.

REPAIR,
Vendor not bound to state that house is out of, 369.
False statement as to, 369.
Silence as to notice by landlord to, 370.

REPLY,
Time for, 465.

REPUGNANCY,
Between recitals and operative part, 287.

REQUISITIONS,
Time for delivering, fixed by condition, 76.
Further requisitions, 76.
Conditions of sale limiting,
As to commencement of title, 79.
defects discovered aliunde, 79.
known defects, 81.
On the abstract, 242.
Root of title, 242.
Length of title, 243.
Completion of abstract, 243.
On the title, 243.
Legal estate, 243.
Powers, 244.
Mortgages and charges, 244.
General inquiry as to incumbrances, 244.
Dower, 244.
Curtesy, 245.
Succession duty, 245.
Descriptions of property, 245.
Intestacy and heirship, 245.
On the evidence of title, 245.
Deeds, 246.
Wills, 246.
Births, deaths, and marriages, 246.
Performance of covenants, 246.
On the use and occupation of the property, 247.
Tenancies, 247.
Easements, 247.
Outgoings, 247.
Waiver of. [*See* WAIVER.]

RESALE,
Condition as to, 97.
Vendor's right to, 97.
For more than first sale, 98.
Deficiency of price on, 118.

RESCISSION,
Condition as to, 77.
Arbitrary, 77.
Where vendor has no title, 77.
To save expense, 77.
To avoid compensation, 78.
After action brought, 78.
Vendor must answer requisitions, 78.
Repayment of deposit, 78.
Instead of compensation, 93.
Auctioneer when a party to action for, 113.
By purchaser for misdescription, 354.
To avoid paying compensation, 378.
For fraud of agent, 386.
For misrepresentation of material fact, 393.
Suppressio veri, 409.
Claim for, should be promptly asserted, 415.
For mistake of one party, 434.
Of executory contracts, 515.
Under clause in agreement, 516.
By subsequent agreement, 517.
By one party against the wish of the other, 618.
For fraud, 519.
For misrepresentation, 519.
For mistake, 520.
For breach of contract, 521.
For delay, 523.
After decree for specific performance, 523.
How right lost, 524.
Of executed contract, 527.
In general only for fraud, 527.
Purchase of a man's own estate, 527.
Option between, and rectification, 529.
None for innocent misrepresentation, 529.
And action of deceit compared, 529.
Status quo must be restored, 531. [*See* RESTITUTIO IN INTEGRUM.]
Barred by laches, 535.

RESERVATION,
In contract,
Of minerals, 71.
Of right to light, 72.
Of other rights, 72.
On sale to railway company, 172.
by railway company of superfluous land, 188
In conveyance,
Of minerals, 292.
Of easements, 294.

RESIDENCE,
Time of the essence on sale of house for, 277.

RESTITUTIO IN INTEGRUM,
No rescission without, 531.
How regarded at common law, and in equity, 531.
Possession does not prevent, 532.
What acts of ownership prevent, 532.
Terms imposed, 533.
Occupation rent, 533.
Repayment of purchase-money, 533.
Allowance for improvements and repairs, 533.

RESTRICTIVE COVENANTS. [*See* COVENANTS, RESTRICTIVE.]

REVERSION,
Sold as a fee simple, difference in value, 357.
Mistake in description of, 357.
Purchaser not bound to take, 372.
Fallen into possession at date of contract for sale, 417.

REVOCATION OF SUBMISSION,
To arbitration, when permissible, 41.
An action lies for, 41.
To what extent precluded by statute, 41.

RIGHT OF WAY. [*See* WAY.]

ROADS,
Intended, condition as to, 88.
Alterations in plan, 88, 292. [*And see* WAY.]

ROADSIDE STRIPS,
Right to, 292.
When passed by conveyance, 292.

ROOT OF TITLE,
What is a good, 193.

SALE BY AUCTION (Ch. IV.),
Within the Statute of Frauds, 2, 99.
Distinct contract in respect of each lot, 99.
Sale of Land by Auction Act, 1867:.106.
Employment of puffers, 106.
Reservation of right to bid, 106.
Reserve price, 107.
When sale void against purchaser, 107.
vendor, 108.

SALE BY THE COURT. [*See* COURT, SALE BY.]

SATISFIED TERMS,
Assignment of, unnecessary, 192, 286.

SEALING OF DEEDS, 298.

SEARCHES,
In the central office, 252.
For judgments, 252.
Crown debts, 253.
Lis pendens, 254.
Annuities, 254.
By officer of Court, 254.
In the county register, 254.

SECOND EDITION OF PARTICULARS OF SALE, 67.

SEISIN,
Recital of, when useful, 287.

SETTLED LAND ACT,
Sale by tenant for life, 141, 143.
trustees for infant, 142.
married woman, 142.
lunatic, 142.
Trustees under, who are, 143.
Notice to trustees, 143.
Sale of mansion-house, 144.
heirlooms, 144.

SETTLEMENT,
When void against creditors, 218.
purchasers, 221.
Rectification, 436.

SEWERS,
Intended, condition as to, 89.

SHARES,
Not within the Statute of Frauds, 12.
Or the Statute of Mortmain, 12.
Rescission of contract to take, 386.

SIGNATURE,
What is sufficient to satisfy Statute of Frauds, 15.
Must authenticate the instrument, 15.
Entry in minute book, 16, 19.
As witness, 16, 17.
Parol evidence to explain, 17.
By agents, 18.
Position of, 19.
Initials a sufficient, 19.
In pencil, 20.
Stamped, 20.
To telegram, 20.
By auctioneer, 36.
Of deed, 298.

SILENCE,
When fraudulent, 404.
Duty to communicate, 408.
Action of deceit never lies for, 408.

SITUATION OF PROPERTY,
False description of, 370.

SOIL,
Of highway passed by conveyance, 292.
private way, 292.
stream, 292.

SOLICITOR,
May purchase from client, 137.
Receipt of purchase-money by, 290.
Notice to, binds client, 321. [*And see* NOTICE, PURCHASE WITH.]
Rebutted by fraud of solicitor, 324.
Non-disclosure of incumbrances by, 389.
When joined as defendant, 448.

SPECIFIC PERFORMANCE,
Of agreement for lease, 4.
Of agreement for grant of licence, 10.
When price to be ascertained by valuation, 39.
Of contract depending on award, 46.
Of contract by letters, 59.
Effect of verbal declarations at sale, 108.
Auctioneer, when made defendant, 113.
Defence of misrepresentation, 384, 413.
Non-fulfilment of promise, 398.
Concealment, when a bar to, 412.
Parol evidence excluded on the part of plaintiff, 422.
Except to explain latent ambiguity, 422.
or where variation, part performed, 423.
or to rebut an equity, 423.
Admitted on the part of defendant, 423.

SPECIFIC PERFORMANCE—*continued.*
Plaintiff may be put to his election, 429.
Jurisdiction of the Court, 440.
Of agreement for sale of land, 441.
leases, 441.
building, 441.
Of what contracts, 441.
Not decreed when damages adequate, 443.
Or when supervision requisite, 443.
Parties to action, 444.
Contract for lease by mortgagor, 446.
by tenant for life, 446.
Assignees of contract, 448.
property, 449.
Death of vendor, 449.
purchaser, 449.
Bankruptcy, effect of, 449.
Claim for possession, 450.
Procedure when defendant does not appear, 450.
Pleading in action, 450.
Legal defences, 453.
Denial of the contract, 454.
Incapacity of either party, 454.
Statute of Frauds, 456.
Contract rescinded, 456.
Plaintiff's breach of contract, 456.
Equitable defences, 457.
Unfairness, 457.
Intoxication, 457.
Hardship, 458.
Inadequacy of price, 458.
Breach of trust, 460.
Voluntary settlement, 460.
Impossible to be performed, 461.
Delay, 461.
Refused without prejudice to action, 457, 480.
Counter-claim for rescission, 464.
Proceedings in action before trial, 466.
Account, when ordered, 466.
Determination of point of law, 466.
Judgment on admissions, 466.
Form of judgment, 471.
Reference of title, 472. [*See* REFERENCE OF TITLE.]
Imperfect title completed after action, 477.
Damages, 478 *et seq.* [*See* DAMAGES.]
Costs, 481 *et seq.* [*See* COSTS.]
Rescission after decree, 523.

SPECIFIC PERFORMANCE WITH COMPENSATION,
Principle on which it rests, 351.
not to be extended, 352.
Vendor and purchaser in different positions, 351, 356.
Assessment of compensation, 356.
Vendor's action,
He must have acted *bonâ fide*, 364.
Substantial fulfilment of contract, 365.
Small deficiency in quantity, 365.
No title to small part, 365.
Slight deficiency in length of term, 365.
Quit rents and rent-charges, 366.
When dismissed, 367.
considerable deficiency in quantity, 367.
no title to material part, 368.
misdescription of tenure, 370.
defects in title, 372.

SPECIFIC PERFORMANCE WITH COMPENSATION—*continued.*
Purchaser's action,
Compensation in general given, 375.
Court will assess compensation, 375.
When compensation refused, 377.
excluded by express contract, 377.
not ascertainable, 378.
hardship to vendor, 379.
knowledge or notice, 363, 380.
breach of trust, 380.

SPORTING, RIGHT OF,
Whether capable of valuation, 358.
An objection to title, 374.

STAKEHOLDER,
Auctioneer's position as, 109.
Agent of vendor receiving deposit is not, 110.
Solicitor not in general, 110.
But if acting for both parties, may be, 111.
Entitled to indemnity if sued, 112.
May adopt third party procedure, 112.
Or interplead, 112.

STAMPS,
Condition as to, 92.
Presumption as to, 197.
Title deeds must be properly stamped, 309.
At expense of vendor, 309.
The duties payable, 305.
Former acts, 306.
Consideration to be stated, 306.
May be reduced, 306.
Sale subject to mortgage, 306.
What instruments must be stamped, 307.
Several matters in one deed, 307.
Conveyance and mortgage, 307.
Receipt indorsed needs no stamp, 307.
Goodwill, 307.
Family transaction, 307.
Exchange and partition, 307.
Settlements, 307.
Order of court making settlement, 307.
Vesting order, 307.
Appointment of new trustee, 307.
Appointment of new trustee and vesting order, 307.
Deeds by building societies, 308.
Deeds by trustee in bankruptcy, 308.
Apportionment of duty, 308.
On sub-sale, 308.
Principal instrument, where several, 308.
Deed of confirmation, 308.
Under Land Transfer Act, 1875..308.
Stamping after execution, 309.
Penalties, 309.
Alterations after execution, 309.
Unstamped deeds, not received in evidence, 310.
Court will not permit unstamped documents to be used, 310.

STANDING BY,
Principle stated, 391, 392.
Expenditure of money, 391.
Sale of property, 392.

STATION,
Specific performance of contract to build, 443.

STATUS QUO,
Restoration of, on rescission, 531. [*See* RESTITUTIO IN INTEGRUM.]

STATUTORY DECLARATION,
Identity of property, 87.

STREAM,
Soil of, passed by conveyance, 292.
Rights of riparian owners, 292.

SUB-PURCHASER,
Assignment of benefit of contract to, 275.
Stamp on conveyance to, 308.
When a party to action for specific performance, 445.

SUCCESSION DUTY,
When payable, 238.
By joint-tenants, 238.
General power of appointment, 238.
Limited power of appointment, 238.
Extinction of charges, 238.
Payable on purchase by charities and corporations, 239.
Payable by purchaser, 239.
On sale by tenant for life and remainderman, 239.
On exercise of trust for sale, 239.
power of sale, 240.
On sale under Settled Land Act, 240.
Assessment of duty, 240.
Rate of duty, 240.
Payable by instalments, 241.
Commutation, 241.
Receipt for duty sufficient discharge, 241.
Requisition as to, 245.

SUMMONS UNDER VENDOR AND PURCHASER ACT, 485.
Evidence admissible, 486.
Statement of facts, 486.
Service out of the jurisdiction, 486.
Whether deposit or damages recoverable, 486.
Examples of, 487—489.
Costs of, 489.
Appeal from order on, 490.
Action not permitted after, 490.

SUPERFLUOUS LAND,
Sale of, by company, 187.
What is, 188.
Sale must be absolute, 188.
Rights of pre-emption, 53, 188.

SUPPORT, RIGHT TO, 214.

SUPPRESSIO VERI,
No action of deceit for, 408.
Rescission for, 409.
Duty to communicate facts, 409.
Fiduciary relationship, 409.
Latent defects, 411.
By purchaser, 412.
A bar to specific performance, 412.

SURPLUS MONEY,
In hands of mortgagee, 150.
As between heir and executors of mortgagor, 150.
Retained by mortgagee, 151.

SURPRISE,
Term omitted by, 423.
introduced by, 424.

SURRENDER,
Of a lease must be in writing, 5.

SURVIVORSHIP,
Of bare power, 121.
Of power annexed to estate, 122.

TACKING OF MORTGAGES, 338.
Third mortgagee buying in first, 338.
Equitable mortgagee obtaining legal estate from mortgagor, 339.
Legal estate necessary, 339.
First mortgagee making further advances, 339.
Must have no notice of intervening mortgage, 339.
Must hold both mortgages in same interest, 340.
Pendente lite, 340.
Debts tacked to mortgage, 340.
Costs of mortgagee tacked to mortgage, 341.
Legislative prohibitions, 341.
Abolished in Yorkshire, 341.

TELEGRAM,
Contract by, whether sufficiently signed, 20.
Acceptance of offer by, 54.
Offer by, requires prompt reply, 56.

TENANCIES,
Statement of, in particulars, 68.
Effect of purchase by tenant, 260.
Notice of interests of tenants, 320, 363.
Vendor bound to disclose nature of, 371.
Misdescription of, 372.

TENANCY FROM YEAR TO YEAR,
Assignment of, must be in writing, 5.
With option to take a lease, when it may be exercised, 51.

TENANT,
Sale of crops by, when within Statute of Frauds, 8.
Agreement by, to pay for improvements, 13.
Possession of, not a part performance, 26.
Purchaser has notice of equitable rights, 49, 320, 363.
Adverse occupant not, 371.

TENANT FOR LIFE,
May sell by auction or private contract, 100.
Consent to sale by trustees, 125.
By one of several, 126.
Whether powers lost by alienation, 126, 142.
To what extent a trustee, 141.
Persons having powers of, 141.
After assignment of life interest, 142.
Investment of capital money by, 156.
Entitled to custody of deeds, 303.
Acknowledgment and undertaking by, 303.
May purchase from his trustees, 411.
Specific performance of contract by, 446.

TENANT IN TAIL,
Has powers of tenant for life, 141.
Inrolment of deed by, 301.
Barring of estate in freeholds, 301.
in copyholds, 301.

TENURE,
Differences of, not capable of valuation, 358.
Misdescription of, a bar to specific performance, 370.
Misrepresentation as to, 397.

TERM OF YEARS,
Misdescription of, 356, 360, 365, 373.

TIMBER,
Sales of, not within Statute of Frauds, 7.
What is, 74.
Condition of sale as to, 74.
On sale by trustees, 129.
Compensation for misdescription, 356, 358.

TIME,
For delivery of abstract, 75.
requisitions, 76.
Waived, 75.
For completion, 95, 276.
Condition of sale as to, 95.
Not of the essence of the contract, 276.
Exceptions to rule, 277.
Made of essence by the contract, 278.
by notice, 279.
Waived, 280, 428.
For commencing action of specific performance, 462.
Property of fluctuating value, 462.
Absence of mutuality, 462.
Suspended by negotiation, 462.
When it begins to run, 463.
When lapse of, confers right to rescind, 523.

TITHES,
Statement of, in particulars, 69.

TITLE,
Condition as to commencement of, 79.
Defects discovered *aliunde*, 79.
Special conditions as to, 81.
Seisin, 81.
Lost document, 81.
Execution of deed, 81.
Assent of executors, 81.
Jurisdiction, 81.
Assumption as to facts, 81.
Assumption known to be false, 82.
Conclusion of law, 82.
Whatever title vendor has, 83.
Length of, 193.
Root of, what is a good, 193.
On sale of leaseholds, 194.
enfranchised copyholds, 194.
allotment, 194.
land exchanged, 194.
Proof of, 195.
Production of documents, 195.
Deeds coming from proper custody, 195.
Secondary evidence, 196.
Presumption as to stamps, 197.
Wills, 198.
Identity of property, 199.
Births, deaths and marriages, 199.
Covenants for, 295. [*And see* COVENANTS FOR TITLE.]
Failure of, as to part, 365, 368.
purchaser's right to damages, on, 497.

TITLE—*continued.*
Misrepresentation as to, 397.
Waiver of objections to, 428.
Questions of, determination of in specific performance, 466.
Inquiry as to, before trial, 467.
Reference of, 472. [*See* REFERENCE OF TITLE.]
When doubtful, 473 *et seq.* [*See* DOUBTFUL TITLE.]
Showing a good, is condition precedent to recovery of price, 493.

TRADE,
covenants in restraint of, 233.
[*And see* COVENANTS, RESTRICTIVE.]

TRANSFER,
of action to Chancery Division, 354.

TRANSFEREE OF MORTGAGE,
Sale by, 152.

TRUST ESTATES,
Devolution of, 124, 283.
Who must convey, 283, 284.
Vesting orders, 283, 285.

TRUST FOR SALE,
Contrasted with power, 121.
Survivorship of, 122.

TRUSTEE IN BANKRUPTCY,
May exercise option of purchase, 52.
Sale by, 100, 154.

TRUSTEES,
Sale by,
Power and trust, 121—125.
Survivorship of power, 121.
Consents, 125.
Public auction or private contract, 127.
Open contract, 127.
Depreciatory conditions, 127.
Employment of agents, 129.
valuers, 129.
Timber valued separately, 129.
Minerals reserved, 129.
When power authorizes mortgage, 130.
partition, 130.
lease, 130.
Option to purchase not authorized, 130.
Time for sale, 130.
When beneficiaries are absolutely entitled, 132.
Amounting to breach of trust, 133, 380.
Receipt of purchase-money, 145, 290.
Payment to solicitor, 290.
Not decreed to pay compensation, 379.
Under Settled Land Act, 143.
Notice to by tenant for life, 143.
Purchase-money paid to, 145.
Number of, 145.
Purchase by,
By direction of tenant for life, 156.
At discretion of trustees, 156.
What may be purchased, 157.
Title less than forty years, 157.

TRUSTEES—*continued.*
Purchase of trust property by, 134.
Trustee selling to himself, 134.
co-trustee, 134.
trustee disclaiming, 134.
buying from *cestui que trust*, 134.
retiring with view to purchase, 135.
who is also solicitor, 135.
agent for purchaser, 135.
Remedies of *cestui que trust*, 139.
Acquiescence, 140.
Confirmation of sale, 140.

TRUSTEES OF CHARITY,
Sale by, 155.

TUNNEL,
Land over or under not superfluous, 188.

UNDERLEASE,
Duration of, 47.
Described as lease not forced on purchaser, 68, 373.
Unless he has notice of fact, 68, 373.
Comprising part only of premises in lease, 68.
Purchaser of, has notice of covenants in lease, 362.

UNDERTAKING,
For safe custody of deeds, 302.

UNDISCLOSED PRINCIPAL,
May adopt contract of agent, 36.

UNDIVIDED SHARE,
Instead of entirety, compensation, 357.
Purchaser not bound to accept, 373.

UNFAIRNESS,
A defence to specific performance, 457.

UNSTAMPED DOCUMENTS,
Condition, throwing expense of stamping on purchaser, 92.
Purchaser can require to be stamped, 309.
At expense of vendor, 309.

USE AND OCCUPATION,
Action for, 495.

USQUE AD CŒLUM,
Purchaser's right to land, 72.

USQUE AD MEDIUM FILUM,
Purchaser's right to stream or road, 292.

USUAL COVENANTS,
What are, 70.
Constructive notice on agreement for underlease, 362.

VALUATION,
Price ascertained by, 38.
How it differs from arbitration, 40.
Of fixtures and other subsidiary items, 42.
How made, 43.
Condition of sale as to, 74.
False statement as to, a bar to specific performance, 400.

VALUERS,
May be employed by trustees, 129.
Solicitor of trustees cannot appoint, 129.
Obstruction of, restrained, 471.

VARIATION. [*See* PAROL EVIDENCE.]

VENDOR,
What is a sufficient description of, 34.
Ascertained by extrinsic circumstances, 34.
incorporated documents, 34.

VENDOR'S LIEN. [*And see* LIEN.]
An exception from Statute of Frauds, 29.

VESTING ORDER,
When necessary, 168, 283, 285.
Must be stamped, 307.

VOIDABLE,
Contracts induced by fraud are, 413, 425, 530.

VOLUNTARY SETTLEMENT,
Purchaser not affected by notice of, 221.
can enforce specific performance, 221, 460.
Settlor cannot enforce specific performance, 221.
Leaseholds import consideration, 222.
Ante-nuptial agreements, 222.
Extrinsic evidence of consideration, 223.
Sale by beneficiaries under, 223.
Not communicated to creditor, 223.
Power of revocation, 223.
In favour of a charity, 224.
Not good root of title, 243.
Volunteers when parties to action for specific performance, 445.

WAIVER,
Of forfeiture,
Receipt for rent to be evidence, 85.
Lessor must know of breach, 85.
Of requisitions,
Of right to send in any requisitions, 247.
Of particular requisitions, 247.
Not sent in by day fixed, 247.
Objections as to validity of contract, 248.
as to title, 248, 415.
By lapse of time, 248.
By acquiescence, 248.
Where purchaser knew of defect before contract, 249.
Conditional acceptance of title, 249.
By taking possession, 249, 364, 415.
Removable and irremovable defects, 250.
Excluded by terms of contract, 251.
Of time,
For delivery of abstract, 75.
requisitions, 76.
For completion, 280.
Express, 280.
Implied, 280.
Of right to compensation, 363.
to rescind, 415, 525.
Parol, of written agreement, 427.

WASTE,
Permissive, by vendor before completion, 272.

WATER,
Right of, should be mentioned in particulars, 71.

WATERCOURSE. [*See* PRESCRIPTION ACT.]

WAY. [*See* PRESCRIPTION ACT.]
Right of, should be mentioned in particulars, 71, 73.
Condition as to, 87.
Conveyance subject to, 87.
When passed by conveyance, 292.
Sale of property without, 370.
Of necessity, 293.
Conveyance "together with all ways, &c.," 293.
May be used for all purposes, 294.
Obstruction of, when a breach of covenants for title, 510.

WILL,
Option of purchase given by, 47.
Not good root of title, 193.
Proved in solemn form, 198.
Probate or office copy generally sufficient, 199.
Registration in county register, 330.
in Middlesex, 330.
in Yorkshire, 300.
of affidavit of intestacy, 301.

WINDING-UP,
Makes rescission impossible, 535.

WINDOWS,
Ancient, 215.
Alterations in, 217.

WITHDRAWAL,
Of offer before acceptance, 55.
how effected, 56.
Of lots, condition as to, 74.

WITNESS,
Signature by, when sufficient to satisfy Statute of Frauds, 17.

WORKS,
Specific performance of agreement to execute, 442.

WRITING,
Necessary on sale of land, 1.
Agreement in, not to be varied by parol, 421.

YORKSHIRE,
Registration in, 326, 329.

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PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE, E.C.

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Author Clerke, Humphrey
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